

5-6-2009

KGF Development LLC v. City of Ketchum Clerk's Record v. 1 Dckt. 36162

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KGF DEVELOPMENT, LLC,

Plaintiff-Appellant,

vs.

CITY OF KETCHUM, a municipal
corporation of the State of Idaho,

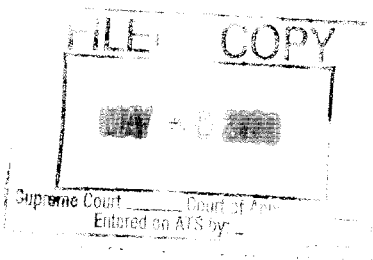
Defendant-Respondent.

260 FIRST LLC,

Intervenor-Respondent.

Supreme Court No.

36162



RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine.

HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE

Fritz X. Haemmerle
P.O. Box 1800
Hailey, Idaho 83333

Plaintiff-Appellant

Stephanie J. Bonney
950 W. Bannock, Ste. 520
Boise, Idaho 83702

Defendant-Respondent

Michael D. Pogue
P.O. Box 3310
Ketchum, Idaho 83340

Defendant-Respondent

ONE VOLUME

COPY 36162

IN THE SUPREME COURT OF THE STATE OF IDAHO

KGf DEVELOPMENT, LLC,)	
)	Supreme Court No.
Plaintiff-Appellant,)	
)	36162
vs.)	
)	
CITY OF KETCHUM, a municipal)	
corporation of the State of Idaho,)	
)	
Defendant-Respondent.)	
)	
260 FIRST LLC,)	
)	
Intervenor-Respondent.)	
)	

RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine.

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Hailey, Idaho 83333

Plaintiff-Appellant

Stephanie J. Bonney
950 W. Bannock, Ste. 520
Boise, Idaho 83702

Defendant-Respondent

Michael D. Pogue
P.O. Box 3310
Ketchum, Idaho 83340

Defendant-Respondent

ONE VOLUME

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Date: 3/27/2009

Time: 11:08 AM

Page 1 of 2

Judicial District Court - Blaine County

ROA Report

User: ANDREA

Case: CV-2008-0000837 Current Judge: Robert J. Elgee

KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

Other Claims

Date		Judge
10/28/2008	New Case Filed - Other Claims	Robert J. Elgee
	Plaintiff: KGF Development, LLC Appearance Fritz X. Haemmerle	Robert J. Elgee
	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Haemmerle, Fritz X. (attorney for KGF Development, LLC) Receipt number: 0006065	Robert J. Elgee
	Dated: 10/29/2008 Amount: \$88.00 (Check) For: KGF Development, LLC (plaintiff)	
	Complaint for declaratory relief	Robert J. Elgee
11/3/2008	Summons: Document Service Issued: on 11/3/2008 to KGF Development, LLC; Assigned to . Service Fee of \$0.00.	Robert J. Elgee
	Summons Issued- Returned to Counsel for Service	Robert J. Elgee
11/4/2008	Notice Of Service (on city of Ketchum)	Robert J. Elgee
11/10/2008	Objection to Plaintiffs Notice of Service	Robert J. Elgee
11/14/2008	Filing: 17 - All Other Cases Paid by: Moore Smith Buxton & Turcke Receipt number: 0006442 Dated: 11/14/2008 Amount: \$58.00 (Check) For: KGF Development, LLC (plaintiff)	Robert J. Elgee
	Defendant City of Ketchums Answer to Plaintiffs Complaint	Robert J. Elgee
12/4/2008	Other party: 260 First, LLC, an Idaho Limited Liability Company Appearance Edward A. Lawson	Robert J. Elgee
	Defendant: City Of Ketchum, Idaho, A Municipal Corp Appearance Stephanie Jaymes Bonney	Robert J. Elgee
	Stipulation to intervention & Order of intervention	Robert J. Elgee
12/5/2008	Notice Of Service	Robert J. Elgee
12/12/2008	Hearing Scheduled (Motion for Summary Judgment 01/12/2009 03:00 PM)	Robert J. Elgee
	Motion for Summary Judgment	Robert J. Elgee
	Affidavit of Kevin G. Fortun in Support of Motion for Summary Judgment	Robert J. Elgee
	Affidavit of Barry J. Lubovski in Support of Motion for Summary Judgment	Robert J. Elgee
	Brief in Support of Motion for Summary Judgment	Robert J. Elgee
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	Defendant City of Ketchum Responses to Plaintiffs Requests for Production of Documents and Request for Admissions	Robert J. Elgee
12/15/2008	Affidavit of Kathleen E. Rivers.... Exhibits in box in Volt	Robert J. Elgee
12/30/2008	Brief in Opposition to Motion For Summary Judgment	Robert J. Elgee
12/31/2008	260 Firsts Opposition Motion For Summary Judgment	Robert J. Elgee
1/6/2009	Reply brief on motion for summary judgment	Robert J. Elgee
1/12/2009	Supplemental Affidavit of Fritz X. Haemmerle in support of motion for summary judgment	Robert J. Elgee
	Hearing result for Motion for Summary Judgment held on 01/12/2009 03:00 PM: District Court Hearing Held	Robert J. Elgee
	Court Reporter: Susan Israel	
	Estimated Number of Transcript Pages for this hearing: LESS THAN 100 PAGES	
	Court Minutes	Robert J. Elgee

Register of Actions - 1

Date: 3/27/2009

Fifth Judicial District Court - Blaine County

User: ANDREA

Time: 11:08 AM

ROA Report

Page 2 of 2

Case: CV-2008-0000837 Current Judge: Robert J. Elgee

KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

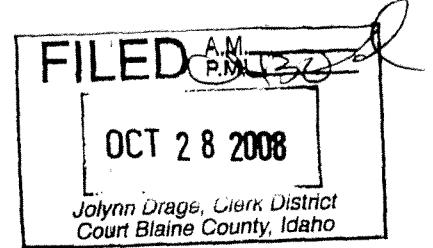
KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

Other Claims

Date		Judge
1/27/2009	Acceptance Of Service	Robert J. Elgee
	Stipulated motion for entry of judgment	Robert J. Elgee
1/28/2009	Judgment	Robert J. Elgee
	STATUS CHANGED: Closed	Robert J. Elgee
	Civil Disposition entered for: City Of Ketchum, Idaho, A Municipal Corp, Defendant; 260 First, LLC, an Idaho Limited Liability Company, Other Party; KGF Development, LLC, Plaintiff. Filing date: 1/28/2009	Robert J. Elgee
2/4/2009	Notice Of Appeal	Robert J. Elgee
	Appealed To The Supreme Court	Robert J. Elgee
	STATUS CHANGED: Inactive	Robert J. Elgee
	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: Haemmerle, Fritz X. (attorney for KGF Development, LLC) Receipt number: 0007995 Dated: 2/6/2009 Amount: \$15.00 (Check) For: KGF Development, LLC (plaintiff)	Robert J. Elgee
2/6/2009	Bond Posted - Cash (Receipt 7996 Dated 2/6/2009 for 100.00)	Robert J. Elgee
2/17/2009	Request for additional record	Robert J. Elgee

Register of Actions-2

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
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Hailey, ID 83333
tel: (208) 578-0520
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E-mail: fxh@haemlaw.com
ISB # 3862



Attorneys for the Plaintiff

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

KGF DEVELOPMENT, LLC,

Plaintiffs,

vs.

**CITY OF KETCHUM, a municipal
corporation of the State of Idaho;**

Defendant,

**260 FIRST, LLC, an Idaho Limited
Liability Company,**

Intervenor.

) **Case No. CV-08- 837**

) **COMPLAINT FOR DECLARATORY
RELIEF**

) **Fee: A - \$88.00**

COME NOW the Plaintiff, KGF Development, LLC, ("Plaintiff"), by and through their attorney of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and complain and allege as follows:

JURISDICTION AND VENUE

1. Plaintiff, KGF Development, LLC ("KGF"), is at all relevant times herein an limited liability company doing business in the State of Idaho, County of Blaine.

2. Defendant, City of Ketchum ("City"), is a political subdivision of the State of Idaho, County of Blaine.

GENERAL ALLEGATIONS

3. KGF owns property in City of Ketchum, State of Idaho, more particularly described as follows: Units C1 through C12, 2, 4, 6 and 7, of the Copper Ridge Condominiums, according to the official plat thereof, recoded as Instrument No. 530070, records of Blaine County, Idaho ("Copper Ridge"). The Copper Ridge plat was recorded on December 15, 2005.

4. Copper Ridge was developed and built with extensive west facing windows in the penthouses to take advantage of its unobstructed views of Mt. Baldy. Under existing Ketchum Ordinances at the time, the highest Copper Ridge could have been built was 40 feet, and no building could be built in the future that would obstruct the western views of Copper Ridge. Copper Ridge is actually 38 feet high.

5. The western views of Mt. Baldy were expected to be and have been a major selling point for the Copper Ridge penthouses, which were expected to sell in the neighborhood of \$3,000,000.

6. On or about February 19, 2008, the Council adopted City of Ketchum Ordinance No. 1034 ("TDR Ordinance"). The purpose of the Ordinance was to create the ability to transfer development rights, as allowed under the Idaho Local Land Use Planning Act, Idaho Code Section 67-6515A and/or under the "Preservation of Historic Site Act" (Idaho Code Sections 67-

4601 through 67-4619). With the adoption of the new TDR Ordinance, properties could be built 50 feet in height.

7. 260 First, LLC ("260 First"), an Idaho limited liability company doing businesses the State of Idaho, County of Blaine, owns Lots 5, 6 and 7, Block 38, Ketchum Townsite. 260 First has obtained design review approval for a four-story building, said building being 50 feet in height. The application was filed and approved under the TDR Ordinance.

8. As a result of the adoption of the TDR Ordinance and the approved application to develop a 50-foot building, Copper Ridge will lose its view of Mt. Baldy when the 50-foot building is built. As a result, KGF, as the developer of Copper Ridge, has suffered a palpable, irreparable injury, said injury is unique and not shared by the public as a whole. The injury includes, but is not necessary limited to the following: (a) KGF lost at least two sales of penthouse units; and (b) KGF had to agree to a \$100,000 "hold back" pending the outcome of this legal action as to the validity of the TDR Ordinance. If the TDR Ordinance is upheld, KGF will lose the money.

CLAIM FOR DECLARATORY JUDGMENT

9. The Plaintiff restates and alleges the allegations contained paragraphs 1 through 10 and incorporates each allegation into Count One.

10. The City lacked authority to adopt the TDR Ordinance under the Idaho Local Land Use Planning Act, including, but not necessarily limited to, Idaho Code Section 67-6515A, and/or under the "Preservation of Historic Site Act", including but not necessarily limited to, Idaho Code Sections 67-4601 through 67-4619. Therefore, the TDR Ordinance is null and void.

DEMAND FOR ATTORNEY FEES AND COSTS

As a result of the City's actions, the Plaintiff has had to retain counsel. For services rendered, the Plaintiff is entitled to attorney fees and costs should they prevail in this action pursuant to Idaho Code Sections 12-117, 12-120(3), 12-121, and pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

RIGHT TO AMEND

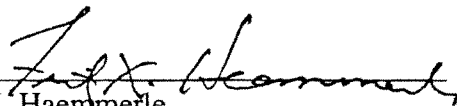
The Plaintiff reserves the right to amend this Complaint in any respect as motion practice and discovery proceed in this matter.

WHEREFORE, the Plaintiff prays for the following relief:

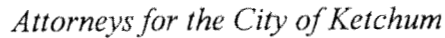
- A. On the Complaint for Declaratory Relief, a finding that the TDR Ordinance was adopted without any lawful authority.
- B. For an award of reasonable costs and attorneys' fees pursuant to applicable law, including but not limited to Idaho Code Sections 12-117, 12-120(3), 12-121, and Idaho Rule of Civil Procedure 54; and
- C. For such other and further relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 22nd day of October, 2008.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: 
Fritz X. Haemmerle

Stephanie J. Bonney, ISB No. 6037
Susan E. Buxton, ISB No. 4041
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702
Tel: 208/331/1800
Fax: 208/331/1202



KGF DEVELOPMENT, LLC,

VS.

Defendant,

Intervenor.

Case No. CV-08-837

**DEFENDANT CITY OF KETCHUM'S
ANSWER TO PLAINTIFF'S COMPLAINT**

COMES NOW the City of Ketchum, an Idaho municipal corporation (“Ketchum”), by and through its counsel of record, Stephanie J. Bonney of Moore, Smith, Buxton & Turcke, Chartered, and answers Plaintiff’s, KGF Development, LLC (“Plaintiff”), Complaint as follows:

Ketchum denies all allegations contained in Plaintiff's Complaint not specifically admitted herein.

SPECIFIC ADMISSION AND DENIALS

1. Ketchum admits the allegations contained in Paragraph 1 of the Complaint.
2. Ketchum admits the allegations contained in Paragraph 2 of the Complaint.
3. Ketchum is without information or belief as to the truth of the allegations contained in Paragraph 3 of the Complaint and therefore denies all such allegations
4. Ketchum is without information or belief as to the truth of the allegations contained in Paragraph 4 of the Complaint regarding the reasons for developing and building Copper Ridge and therefore denies all such allegations. Ketchum denies the remaining allegations contained in Paragraph 4 of the Complaint.
5. Ketchum is without information or belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and therefore denies all such allegations
6. Ketchum admits the allegations contained in Paragraph 6 of the Complaint solely as to the passage of Ordinance 1034, affirmatively alleges that the Ordinance speaks for itself, and denies the remaining allegations.
7. Ketchum admits the allegations contained in Paragraph 7 of the Complaint to the extent that 260 First is a limited liability company and owns Lots 5, 6, and 7, Block 38, Ketchum Townsite. 260 First obtained design review approval for a four-story building, said structure being approved for 48 feet in height. Design review approval was ultimately obtained from the City on June 23, 2008.
8. Ketchum denies the allegations contained in Paragraph 8 of the Complaint.
9. Ketchum restates and realleges its answers in Paragraphs 1-8.
10. Ketchum denies the allegations contained in Paragraph 10 of the Complaint.

11. Ketchum denies that the Plaintiff is entitled to costs and attorney fees and denies that Plaintiff is entitled to any relief.

FIRST AFFIRMATIVE DEFENSE

The Plaintiff has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The City reserves the right to file an amended Answer.

ATTORNEY FEES

The City has been required to use the services of the City Attorney and may retain additional legal counsel in defense of this action. Pursuant to Idaho Code Sections 12-117, 12-120, 12-121, Rule 54(e) of the Idaho Rules of Civil Procedure and other applicable law, the City is entitled to an award of its reasonable attorney fees and costs incurred in this action.

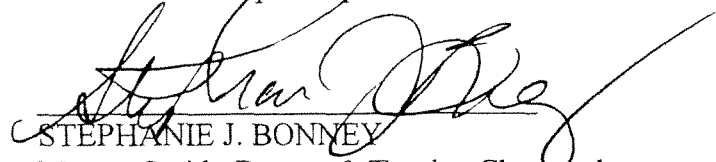
PRAYER FOR RELIEF

WHEREFORE, the City prays for relief as follows:

1. That Plaintiff's Complaint be dismissed and Plaintiff take nothing thereby; and
2. That the City be awarded its reasonable attorney fees and costs incurred in this matter pursuant to Idaho Code Sections 12-117, 12-120, 12-121 and Rule 54(e) of the Idaho Rules of Civil Procedure; and
3. For such other and further relief as the Court deems just and proper.

DATED this 12TH day of November, 2008.

CITY OF KETCHUM,
An Idaho municipal corporation


STEPHANIE J. BONNEY
Moore, Smith, Buxton & Turcke, Chartered

CERTIFICATE OF SERVICE

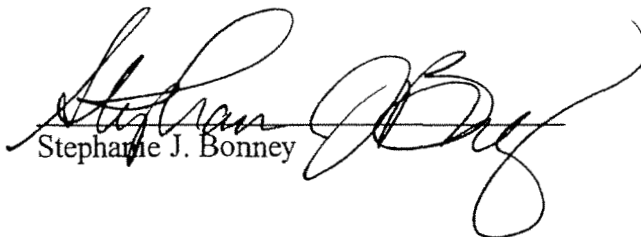
I hereby certify that a true and correct copy of the foregoing **City of Ketchum's ANSWER TO PLAINTIFF'S COMPLAINT** was this 12th day of November, 2008 served upon the following individuals and in the corresponding manner:

Michael Pogue
Lawson & Laski, PLLC
P.O. Box 3310
Ketchum, ID 83340

Method: U.S. Mail

Fritz X. Haemmerle
Haemmerle & Haemmerle, PLLC
P.O. Box 1800
Hailey, ID 83333

Method: US Mail

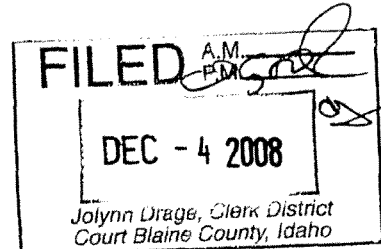

Stephanie J. Bonney

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ORIGINAL

EDWARD A. LAWSON, ISBN 2440
MICHAEL D. POGUE, ISBN 6518
LAWSON & LASKI, PLLC
PO Box 3310
Ketchum, ID 83340
Tel. (208) 725-0055
Fax: (208) 725-0076

Attorneys for Intervenor 260 First LLC



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner-Plaintiff

vs.

CITY OF KETCHUM, a municipal corporation
of the State of Idaho

Respondent-Defendant.

260 FIRST LLC, a Washington limited liability
company,

Intervenor.

Case No.: CV-08-837

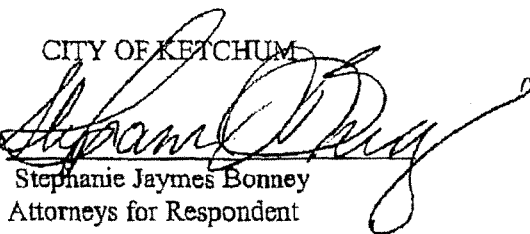
**STIPULATION TO
INTERVENTION AND ORDER OF
INTERVENTION**

COMES NOW counsel of record for the above-named parties KGF DEVELOPMENT,
LLC and CITY OF KETCHUM, and hereby stipulate and consent to the intervention of 260
FIRST LLC, a Washington limited liability company, in the above-captioned matter.

DATED this 18 day of November 2008.

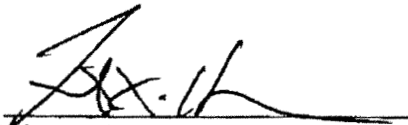
CITY OF KETCHUM

By:


Stephanie Jaymes Bonney
Attorneys for Respondent

DATED this 2nd day of December 2008

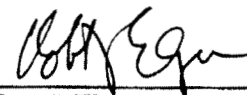
HAEMMERLE & HAEMMERLE, PLLC

By: 
Fritz Xavier Haemmerle
Attorneys for Petitioner

ORDER

Upon motion of the parties for good cause shown, IT IS HEREBY ORDERED, that 260 FIRST LLC, a Washington limited liability company, may Intervene in this matter.

Dated this 3 day of December, 2008.


Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec. 5, 2008, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz Xavier Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333
Fax: (208) 578-0564

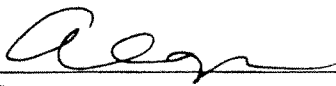
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Stephanie Jaymes Bonney
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702
Fax: (208) 331-1202

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Michael D. Pogue
Lawson & Laski, PLLC
PO Box 3310
Ketchum, ID 83340
Fax: (208) 725-0076

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy



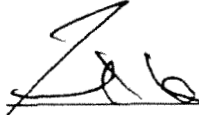
Clerk of the Court

FILED 319
DEC 12, 2008
49

14

DATED this 2nd day of December, 2008.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: 
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2008, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
MOORE SMITH BUXTON & TURKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702

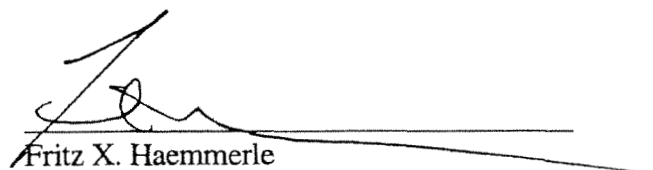
Ed Lawson
Michael Pogue
LAWSON & LASKI, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

✓

By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.


Fritz X. Haemmerle

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
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E-mail: fxh@haemlaw.com
ISB # 3862

FILED 37
DEC 12, 2008
60
5

Attorneys for the Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner/Plaintiff,

vs.

CITY OF KETCHUM, a Municipal
Corporation of the State of Idaho,

Respondent/Defendant.

) Case No. CV-08-837

)
) AFFIDAVIT OF KEVIN G. FORTUN IN
) SUPPORT OF MOTION FOR SUMMARY
) JUDGMENT

STATE OF WASHINGTON,)

) ss.

County of King.)

KEVIN G. FORTUN, being sworn upon oath, deposes and states as follows:

1. I am the managing member of the Plaintiff in the above-entitled case. I make the averments contained herein of my own personal knowledge and would testify to the facts as presented herein if called upon to do so.

2. I was original owner and developer of the building known as Copper Ridge, which is located in the City of Ketchum, State of Idaho, and is more particularly

AFFIDAVIT OF KEVIN G. FORTUN IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 1

described as follows: Units C1 through C12, 2, 4, 6 and 7, of the Copper Ridge Condominiums, according to the official plat thereof, recorded as Instrument No. 530070, records of Blaine County, Idaho ("Copper Ridge"). The property is located at 271 North Washington Ave., Ketchum, Idaho. I still own the majority of the condominiums in the Copper Ridge building, including top floor penthouse units.

3. The Copper Ridge plat was recorded on December 15, 2005. At the time the Copper Ridge building was built, the highest building that could be built in the City of Ketchum was approximately 38 feet. Therefore, we built Copper Ridge 38 feet high.

4. Copper Ridge sits on a bench that rises above the property immediately to the west. Because of the bench, I built Copper Ridge with extensive west facing windows in the penthouses to take advantage of its unobstructed views of Mt. Baldy. Because the highest one could build was 38 feet, no building could be built in the future that would obstruct such views. The views were expected to be and have been a major selling point for the Copper Ridge penthouses, which were expected to sell in the neighborhood of \$3,000,000.

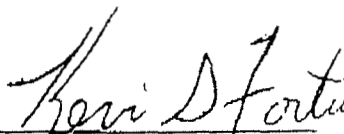
5. With the adoption of the new TDR Ordinance, the adjacent property to the west was designated as a "Receiving property." This means that that owner may build a four-story, 50-foot-high building on the property. In fact, the owner of the adjacent property has submitted an application to the City of Ketchum under the TDR Ordinance to build such a building. The applicant has purchased development rights under the TDR Ordinance to support his application to build a building that is 50 feet high.

6. Since Copper Ridge is approximately 38 feet high, the new building will completely obstruct Copper Ridge's views of Mt. Baldy.

7. As a result of the adoption of the TDR Ordinance and the pending application to develop a 50-foot building on the property to the west which would obstruct Copper Ridge's views of Mt. Baldy, I had at least two sales of penthouse units fall through. Also, under another contract for sale of one of the top floor penthouses, I had to agree to a \$100,000 "hold back" pending the outcome of this appeal as to the validity of the TDR Ordinance. If the TDR Ordinance is upheld, I will lose that amount. If the TDR Ordinance is struck down, I will receive the \$100,000 balance of the purchase price.

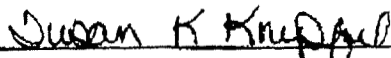
FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 12 day of December, 2008.



KEVIN G. FORTUN

SUBSCRIBED AND SWORN to before me this 12 day of December, 2008.



NOTARY PUBLIC FOR WASHINGTON

Residing at: Kirkland WA

Commission expires: 6-10-09

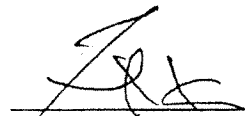
CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of December, 2008, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
MOORE SMITH BUXTON & TURKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702

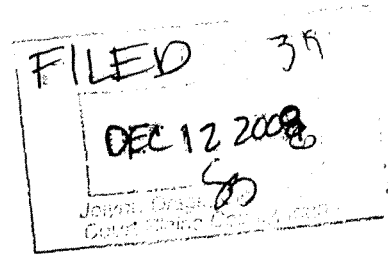
Ed Lawson
Michael Pogue
LAWSON & LASKI, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

- X By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.
- By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.
- By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.



Fritz X. Haemmerle

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
tel: (208) 578-0520
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E-mail: fxh@haemlaw.com
ISB # 3862



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Defendants.

) **Case No. CV-08-837**
)
) **BRIEF IN SUPPORT OF**
) **MOTION FOR**
) **SUMMARY JUDGMENT**

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1

sought a declaratory judgment that the ordinance was void for faulty notice and because the ordinance exceeded the City's authority. That case was Blaine County Case No. CV-07-250.¹ The District Court ultimately ruled in that case on April 30, 2008 that Ordinance 1005 was void due to the faulty notice.

In the meantime, on February 19, 2008, the Ketchum City Council adopted Ordinance 1034. Ordinance 1034 restated and modified Ordinance 1005. Ordinance 1034 cured the notice problems, added findings regarding a market analysis done previously, and made a few other modifications to the original Ordinance 1005. On March 18, 2008, KGF filed a declaratory judgment and an administrative appeal from the City's adoption of Ordinance 1034. That case was filed as Blaine County Case No. CV 08-233.

After Case CV 08-233 was filed, the Idaho Supreme Court ruled in *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008), that it was not proper to combine declaratory judgment actions with appeals from administrative actions. Thus, the parties stipulated to the dismissal of the Complaint for Declaratory Judgment from Blaine County Case No. CV 08-233 and to the re-filing of that Complaint in this case, Blaine County Case No. CV 08-837.

In the Complaint, KGF claims that Ordinance 1034 was adopted in violation of I.C. 67-6515A and Title 67, Chapter 46, the Historic Preservation Act. As such Ordinance 1034 is void. Some discovery has occurred and KGF has filed a Motion for

¹ Blaine County Case No. 07-250 was later consolidated with Blaine County Case No. 08-167, an administrative appeal and declaratory judgment action contesting the issuance of a building permit under Ordinance 1005.

Summary Judgment on the validity of Ordinance 1034. This Brief is submitted in support of that motion.

II. FACTS

1. KGF owns property in City of Ketchum, State of Idaho, more particularly described as follows: Units C1 through C12, 2, 4, 6 and 7, of the Copper Ridge Condominiums, according to the official plat thereof, recoded as Instrument No. 530070, records of Blaine County, Idaho ("Copper Ridge"). The property is located at 271 North Washington Ave., Ketchum, Idaho. (*Affidavit of Kevin G. Fortun*, ¶2.)

2. The Copper Ridge plat was recorded on December 15, 2005. At the time the Copper Ridge building was built, the maximum height for buildings in the City of Ketchum was 38 feet. Copper Ridge was built to the maximum height. (*Affidavit of Kevin G. Fortun*, ¶3.)

3. The Copper Ridge property lies on the western edge of a bench that rises above the property immediately to the west. (*Id.*, ¶4.) Under the existing Ketchum Ordinances, the highest a building could have been built on the Copper Ridge property without a waiver of the requirements of the Ketchum Municipal Code ("KMC") was 38 feet, a three-story building. (*Id.*; *Affidavit of Barry Luboviski*, ¶4.) Furthermore, at the time Copper Ridge was built, there were no buildings in Ketchum that were higher than 38 feet and the City had never permitted a building over 38 feet. (*Id.*, ¶5.)

4. Therefore, due to Copper Ridge's bench location, its building was constructed with extensive west facing windows in the penthouses that provided unobstructed views of Mt. Baldy. (*Affidavit of Kevin G. Fortun*, ¶4.) Under the existing zoning, no building could have been built to the west that would obstruct those views.

(*Id.*) The views were expected to be and have been a major selling point for the Copper Ridge penthouses, which were expected to sell in the neighborhood of \$3,000,000. (*Id.*)

5. In 2006, the "Downtown Ketchum Master Plan" recommended that the Historic Preservation Commission be engaged to advise the City of Ketchum on preserving historic buildings through the use of transfer of development rights and that the city planner take the lead on that effort. (*Robrahn Depo.*, in Blaine County Case No. CV 08-233, p. 17, l. 21 – p. 20, l. 4; *see also Cady Depo.*, Exhibit 3, *Affidavit of Beth Robrahn*, Exhibit C, p. 57.)²

6. Pursuant to that recommendation, Ketchum Planner, Beth Robrahn, began preparing an ordinance for the transfer of development rights from lots with historic buildings to other lots. (*Robrahn Depo.*, Tr. p. 20, l. 25 – p. 21, l. 8; *see also Affidavit of Beth Robrahn*, ¶ 8-12.) Ms. Robrahn stated that the purpose for drafting the ordinance was for the preservation of historic properties in the City of Ketchum. (*Affidavit of Beth Robrahn*, ¶ 8-12, *Robrahn Depo.*, Tr. p. 33, l. 6-21; p. 29, l. 25 – p. 30, l. 9.) Ms. Robrahn stated that the transfer of development rights ordinance was not drafted to protect open space, wildlife or critical areas. (*Affidavit of Beth Robrahn*, ¶ 8-12, Tr. p. 33, l. 6 – p. 37, l. 15.)

² The Deposition of Beth Robrahn includes Exhibit 1, which is the Affidavit of Beth Robrahn, and Exhibit 2, which is the Administrative Record in Blaine County Case No. 08-233. The Deposition of Sandy Cady includes Exhibit 1, which is the Administrative Record in Blaine County Case No. 07-250, Exhibit 2, which is the Administrative Record in Blaine County Case No. 08-233, and Exhibit 3, which is the same Affidavit of Beth Robrahn. To avoid duplicating copies of the Robrahn affidavit and the administrative records, the complete transcript and exhibits to the Deposition of Sandy Cady, and only the transcript of the Deposition of Beth Robrahn are being submitted with this Motion. However, for clarity, citations hereafter will be to the Robrahn Deposition Transcript (*Robrahn Depo.*, Tr.), the Affidavit of Beth Robrahn, or the particular administrative Records that are attached to the Cady Depo. The Deposition of Beth Robrahn is attached to the Affidavit of Kathleen Rivers as Exhibit 4. The Deposition of Sandy Cady is attached to the Affidavit of Kathleen Rivers as Exhibit 3.

7. Ms. Robrahn attended Ketchum Historic Preservation Commission meetings, reviewed the "Archeological and Historic Survey Report" (Survey) with the Commission, and drafted Ordinance 1005. (*Robrahn Depo.*, Tr. p. 24, l. 9 – p. 29, l. 18; p. 41, l. 13-15; p. 51, l. 6-9; *see also, Affidavit of Beth Robrahn*, ¶11-12.)

8. As part of the Survey, the Commission also identified those properties in the City of Ketchum that are either listed on or meet the criteria for listing on the National Register of Historic Places. (*Affidavit of Beth Robrahn*, Exhibit E "Archeological and Historic Survey Report," Attachment 4; *Robrahn Depo.*, Tr. p. 21, l. 21- p. 23, l. 15.)

9. The Historic Preservation Commission recommended criteria for designating a site as a Sending Site under the ordinance and identified the properties it wanted preserved as Sending Sites. (*Affidavit of Beth Robrahn*, ¶12.) In evaluating Sending Sites, the Commission looked at a site's historical, architectural, educational, and cultural significance. (*Id.*)

10. The Historic Preservation Commission's recommendation was to allow the owner of property on which a historic building was located to sell their development rights as an incentive for preserving the historic building. (*Robrahn Depo.*, Tr. p. 31, l.3-8.)

11. Thus, the ordinance drafted by Ms. Robrahn designated 40 Sending Sites that could be preserved by allowing the property owner to sever the development rights from that property and transfer them to any of 68 designated Receiving Sites. (*Affidavit of Beth Robrahn*, ¶14-18, and Exhibit L to affidavit; *Robrahn Depo.*, Tr. p. 41, l. 13-15;

p. 51, l. 6-9.) The Sending Sites were limited to those sites where a historic building or heritage site was located. (*Robrahn Depo.*, Tr. p. 30, l. 24 – p. 31, l. 2.)

12. The ordinance drafted by Ms. Robrahn was presented to the Planning and Zoning Commission as Ordinance 1005 and public hearings before the Commission were held in December, 2006. (*Affidavit of Beth Robrahn*, ¶14-18; *Robrahn Depo.*, Tr. p. 41, l. 13-15; p. 51, l. 6-9.) The Planning and Zoning Commission recommended the adoption of the draft Ordinance 1005 and it then went to the City Council. (*Affidavit of Beth Robrahn*, ¶ 21.)

13. The City Council held public hearings on the draft ordinance in January and February, 2007. (*Affidavit of Beth Robrahn*, ¶ 22.) When the City Council ultimately adopted Ordinance 1005 on February 22, 2007, approximately half of the recommended Sending Sites were eliminated and the number of Receiving Sites was increased. (*Affidavit of Beth Robrahn*, ¶ 25.)

14. As adopted, Ordinance 1005 was entitled “Transfer of Development Rights.” It designated 22 sites as Sending Sites and 102 Receiving Sites. (*Affidavit of Beth Robrahn*, ¶ 26, and Exhibit L to affidavit.)

15. The provisions of Ordinance 1005 most relevant to this case included the following:

- Only four (4) of the twenty-two (22) designated Sending Sites were either listed or met the criteria for listing on the National Register of Historic Places. (*Robrahn Depo.*, Tr. p. 39, l. 17-19; p. 43, l. 44 – p. 44, l. 22). No other Sending Sites met those criteria. (*Id.*)
- The method for calculating the square footage of development rights that could be sold by the owner of a Sending Site to the owner of a Receiving

Site was based on the floor area ratio (FAR³) of the Sending Site. (*Affidavit of Beth Robrahn*, Exhibit L to affidavit.) Under the existing zoning, development in the Community Core District (downtown Ketchum) was limited to a FAR of 1.0. (KMC, Section 17.64.010.H.⁴) To encourage the preservation of the Sending Sites, rather than development being limited to an FAR of 1.0, the owner of a Sending Site could sell development rights of up to a 2.25 FAR to the owner of a Receiving Site. (*Affidavit of Beth Robrahn*, Exhibit L to affidavit.) On the purchase of such development rights, the owner of a Receiving Site could build a four-story building to a height of 50 feet and further development on the Sending Site was limited. (*Id.*) Receiving Sites that did not purchase development rights and all other non-designated properties continued to be subject to the existing height limitation of 38 feet (three stories) and an FAR of 1.0. (*Id.*; KMC, Section 17.64.010.H.)

- The Sending and Receiving Sites designated under Ordinance 1005 were interspersed throughout downtown Ketchum. (*Robrahn Depo.*, Tr. p. 37, l. 12-15; *Affidavit of Beth Robrahn*, Exhibit L.) Further, there were no location limitations on the sale of development rights to Receiving Sites. (*Id.*) Thus, an owner of a Sending Site could sell development rights to the owner of a Receiving Site located next door, which would result in a four story building located next to a historic property. (*Robrahn Depo.*, Tr. p. 36, l. 25 – p. 37, l. 15; p. 40, l. 8 – 22); *Affidavit of Beth Robrahn*, Exhibit L).
- Vacant lots were not eligible to be Sending Sites. (*Robrahn Depo.*, Tr. p. 35, l. 2-7).

16. Ordinance 1005 was codified in the KMC as Section I, to Title 17, Chapter 17.64.

17. From the adoption of Ordinance 1005, KGF filed a Petition for Review and for Declaratory Judgment on March 21, 2007. That was Blaine County Case No. CV-07-250. Among other things, KGF alleged defective notice in the adoption of

³ Floor Area Ratio is arrived at by multiplying the square footage of the Lot times the variable specified under the zoning ordinance.

⁴ Ketchum Municipal Code Section 17.64.010 is attached to the Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions, Response to Request for Production No. 1.

Ordinance 1005. KGF ultimately prevailed on that challenge on April 30, 2008 when the District Court declared Ordinance 1005 to be null and void due to defective notice.¹⁷

18. While that case was pending, the City redrafted Ordinance 1005 as Ordinance 1034 and adopted it on February 19, 2008. (*Cady Depo.*, Exhibit 2, Administrative Record, Blaine County Case No. 08-233, at Tab for City Council Meeting, February 19, 2008⁵). Ordinance 1034 restated Ordinance 1005 in its entirety and made some minor modifications unrelated to KGF's challenge here to the ordinance. (*Id.*)

19. Ordinance 1034 is identical to Ordinance 1005 in the following relevant particulars:

- Ordinance 1034 restated the exact same Sending Sites and Receiving Sites as those designated in Ordinance 1005. (*Id.*; See also *Robrahn Depo.*, Tr. p. 38, l. 15 – p. 39, l. 19; *Affidavit of Beth Robrahn*, Exhibit L).
- Just as in Ordinance 1005, the same four (4) Sending Sites in Ordinance 1034 meet the criteria for inclusion on the National Register of Historic Places. (Ordinance 1034; *Robrahn Depo.*, Tr. p. 38, l. 15 – p. 39, l. 19; p. 43, l. 44 – p. 44, l. 22). No other Sending Sites meet the criteria. (*Id.*)
- Ordinance 1034 restated the same method as Ordinance 1005 for calculating the square footage of development rights that can be sold by the owner of a Sending Site to the owner of a Receiving Site. (Ordinance 1034, Section 2.I.5). Again, rather than its development being limited to a floor area ratio (FAR) of 1.0, the owner of a Sending Site can sell up to 2.25 times its development rights to the owner of a Receiving Site (*Id.*) On the purchase of such development rights, the owner of a Receiving Site can build a four-story building to a height of 50 feet. (*Id.*; *Robrahn Depo.*, Tr. p. 47, l. 16-20; KMC, Section 17.64). Only very limited development can occur thereafter on the Sending Site. (Ordinance 1034, Section 2.I.6.a.iv.) Receiving Sites that do not purchase development rights and all other non-designated properties continue to be subject to the existing height limitation under the

⁵ Hereafter, citations will be to Ordinance 1034.

zoning ordinance of 40 feet (three stories) and an FAR of 1.0. (KMC, Section 17.64.010.H.)

- Like Ordinance 1005, a designated Sending Site may transfer development rights to any Receiving Site, and the Sending and Receiving Sites are dispersed throughout the Community Core District. (*Affidavit of Fritz X. Haemmerle*, Exhibit 1 - Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions, Response to Request for Admission No. 1; *see also* Ordinance 1034, Figure 1). Thus, a four-story building could be located right next to a historic property. (*Id.*)
- Like Ordinance 1005, Ordinance 1034 does not allow the owner of a vacant lot to transfer its development rights. (*Robrahn Depo.*, Tr. p. 35, l. 2-7; *see also* Ordinance 1034, Section 2., I., 5.j.)

20. The City of Ketchum has not enacted an ordinance establishing a historic district pursuant to I.C. § 67-4607. (*Affidavit of Fritz X. Haemmerle*, Exhibit 1 - Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions, Response to Request for Admission No. 15).

21. The City of Ketchum has not followed the procedures under I.C. § 67-4607 for designating historic properties.

22. Prior to the time the District Court ruled that Ordinance 1005 was void, a building permit was issued to 260 First LLC ("260 First"), for Lots 5, 6 and 7, Block 38, Ketchum Townsite, based upon its plans to construct a four-story, 50-foot high building on the property. (*Affidavit of Barry Luboviski*, ¶4.) The applicant proposed to purchase development rights from a Sending Site under Ordinance 1005, and now that the Ordinance has been declared void, under Ordinance 1034. (*Id.*) The application is now being considered under Ordinance 1034. (*Id.*)

23. The proposed four story, 50-foot-high building is on the property directly west of and below the Copper Ridge property. (*Id.*) If not for Ordinance 1005 and

Ordinance 1034, 260 First could not build a four-story, 50-foot building on its property. (KMC, Section 17.64.010.H.; *Affidavit of Barry Luboviski*, ¶4).

24. As a result of the adoption of Ordinance 1005 and 1034, and 260 First's application to develop a 50-foot building, the Copper Ridge building's views of Mt. Baldy will be obstructed. (*Affidavit of Kevin G. Fortun*, ¶6.) As a result of 260 First's proposal, KGF has already lost at least two sales of penthouse units; and has had to agree to a \$100,000 "hold back" pending the outcome of this legal action as to the validity of Ordinance 1034. (*Id.*, ¶7.) If the Ordinance 1034 is upheld, KGF will lose those funds. (*Id.*)

III. ISSUES PRESENTED

1. Whether ordinance 1034 exceeds the City's authority to transfer development rights?
 - a. Whether Ordinance 1034 exceeds the City's authority under Section 67-6515A of the Local Land Use Planning Act ("LLUPA")?
 - b. Whether Ordinance 1034 exceeds the City's authority under the Historic Preservation Act?
2. Whether KGF is entitled to attorney's fees and costs?

IV. STANDARD OF REVIEW

1. Summary Judgment.

The standard of review for summary judgment is as follows:

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). "I.R.C.P. 56(e) provides that

the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002) (citations omitted). “Affidavits supporting or opposing the motion for summary judgment ‘shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.’ ” *Id.* “The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.” *Id.* “Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party’s case.” *Id.*

Sprinkler Irrigation Co. v. John Deere Ins. Co., 139 Idaho 691, 85 P.3d 667 (2004).

V. ARGUMENT

A. ORDINANCE 1034 EXCEEDS THE CITY’S AUTHORITY TO TRANSFER DEVELOPMENT RIGHTS.

There are two Idaho statutes enabling cities to adopt ordinances for the transfer of development rights. Those are Idaho Code § 67-6515A of the LLUPA, and Idaho Code § 67-4619 of the Historic Preservation Act.

Determining whether the City had statutory authority to enact Ordinance 1034 involves rules of statutory construction and interpretation. Words of the statute must be given their plain and ordinary meaning. *Paolini v. Albertson’s Inc.*, 143 Idaho 547, 549, 149 P.3d 822 (2006). A specific statute controls over a more general statute when there is any conflict between the two or where the general statute is vague or ambiguous. *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, (1993); *Hansen v. State*, 138 Idaho 865, 868, 71 P.3d 464 (Ct.App. 2003). Where the legislature has expressly stated one thing it is deemed to have excluded another. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho

609, 614, 747 P.2d 18, (1987). Statutes must not be read in a manner that renders another statute a nullity. *Hecla Mining Co. v. Idaho State Tax Commission*, 108 Idaho 147, 151, 697 P.2d 1161, 1165 (1985). Statutes must not be interpreted in isolation but rather “in pari materia” if they relate to the same subject. *Gooding County v. Wybenga*, 137 Idaho, 201, 204, 46 P.3d 18, 21 (2002).

Given the identical terminology and procedures used by the City in Ordinance 1034 to those in Idaho Code § 67-6515A, it is clear that the City attempted to adopt Ordinance 1034 under Section 67-6515A. The Ordinance uses the terminology “sending” and “receiving” in the same manner as Section 67-6515A. The Ordinance cites a “market analysis” that was performed as required by Section 67-6515A(2) to insure that the “receiving” sites had the capacity to accommodate the additional development rights. The transfer of development rights under the Ordinance is expressly made voluntary as mandated by Section 67-6515A(1)(b) and the Ordinance provisions for “severance” of the development rights are drawn from Section 67-6515A(4)-(7).

However, in previous arguments before the Court, the City also claimed to base its authority to enact the Ordinance on Title 67, Chapter 46, the Historic Preservation Act, which applies to the preservation of historic properties.

No matter which statute the City attempts to draw its authority from, Ordinance 1034 exceeds the City’s authority under Sections 67-6515A and 67-4601 *et. seq* for the reasons set forth below.

- 1. Idaho Code § 67-6515A does not apply to the preservation of historic sites but rather to the preservation and protection of open space, wildlife habitat and critical areas, and rural lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.**

Idaho Code § 67-6515A grants cities the authority to create development rights by ordinance and authorize landowners to transfer such rights to fulfill the goals of the city to “preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.” I.C. § 67-6515A(1)(a).

The legislative history for Section 67-6515A makes it clear that “the objectives of a TDR program are to preserve agricultural land and maintain Idaho’s historic rural farming and ranching landscapes, habitat and open space.” (*Affidavit of Kathleen Rivers*, Exhibit 1 - Legislative History of Section 67-6515A; *see e.g.* Addendum, at p. 16, Minutes, Local Government and Taxation Committee, March 15, 1999; *see also* Addendum at p. 20, Letter from Idaho Association of Counties Legislative Chairman, dated March 15, 1999; *see also* Addendum, at p. 22, Letter from Idaho Association of Counties Executive Director, dated March 15, 1999; *see also* Addendum, p. 17, Jaquet, Idaho Statesman, 3/7/93).

In this case, there is no dispute that the Ordinance 1034 was not enacted to protect or preserve agricultural land, wildlife, habitat, or open space. It was enacted to preserve historic buildings. The concept of transferring development rights began with the “Downtown Ketchum Master Plan.” It recommended that the Historic Preservation Commission be engaged to advise the City of Ketchum on preserving historic buildings through the use of transfer of development rights and that the city planner take the lead on that effort. (*Affidavit of Beth Robrahn*, Exhibit C, p. 57; *Robrahn Depo.*, Tr. p. 17, l. 21 – p. 20, l. 4).

Pursuant to that recommendation, Ketchum Planner, Beth Robrahn, began preparing an ordinance for the transfer of development rights from lots with historic buildings to other lots. (*Affidavit of Beth Robrahn*, ¶ 8-12; *Robrahn Depo.*, Tr. p. 20, l. 25 – p. 21, l. 8). Ms. Robrahn stated that the purpose for drafting the ordinance was for the preservation of historic properties in the City of Ketchum. (*Robrahn Depo.*, Tr. p. 33, l. 6-21; p. 29, l. 25 – p. 30, l. 9.) Ms. Robrahn stated that the transfer of development rights ordinance was not drafted to protect open space, wildlife or critical areas. (*Robrahn Depo.*, Tr. p. 33, l. 6 – p. 37, l. 15).

Ms. Robrahn attended Ketchum Historic Preservation Commission meetings, reviewed the “Archeological and Historic Survey Report” (Survey) with the Commission, and drafted Ordinance 1005. (*Robrahn Depo.*, Tr. p. 24, l. 9 – p. 29, l. 18; p. 41, l. 13-15; p. 51, l. 6-9; *see also*, *Affidavit of Beth Robrahn*, ¶11-12).

The Historic Preservation Commission recommended criteria for designating a site as a Sending Site under the ordinance and identified the properties it wanted preserved as Sending Sites. (*Affidavit of Beth Robrahn*, ¶12.). In evaluating Sending Sites, the Commission looked at a site’s historical, architectural, educational, and cultural significance. (*Id.*)

The Historic Preservation Commission's recommendation was to allow the owner of property on which a historic building was located to sell their development rights as an incentive for preserving the historic building. (*Robrahn Depo.*, Tr. p. 31, l.3-8). This process led to the enactment of Ordinance 1005 and when it was declared void, to its restated version, Ordinance 1034.

The Record is replete with references to the fact that what are being preserved by Ordinance 1034 are historic buildings in downtown Ketchum. “The thrust of the Commission’s recommendation was to allow a historic building property owner to sell their development rights as an incentive for preserving their historic building.” (*Cady Depo.*, Exhibit 1, part 1, Complete Certified Copy of Administrative Record for Case No. CV 07-250, at Tab for Council Workshop, November 15, 2006, Memorandum from Beth Robrahn, Senior Planner to Mayor and City Council, dated November 15, 2006). “It is the Planning and Zoning Commission’s recommendation to prioritize the preservation of historic buildings.” (*Cady Depo.*, Exhibit 1, part 1, at Tab for Council Meeting, January 16, 2007, Staff Report, I. Background, Paragraph 3).

Previously, 260 First has argued that the ordinance protects open space. Yet, neither open space, wildlife, or critical areas were intended to be protected under Ordinance 1034. (*Robrahn Depo.*, Tr. p. 33, l. 6 – p. 37, l. 15). In fact, just the opposite is true. Vacant lots are specifically prohibited from transferring development rights. Ordinance 1034, Section 2.I.j. If open space was truly the goal, surely owners of vacant lots would be encouraged to keep them vacant. Also, by permitting a Sending Site to sell more than two times the development rights it could normally develop, open space in downtown Ketchum is actually reduced by the Ordinance.

Another argument made previously was that the ordinance preserves the small “scale” of buildings in downtown Ketchum, and that qualifies as open space, but that argument is also specious. Under Ordinance 1034, a four-story, 50-foot building may be built right next to a one story historic building, thereby negating any preservation of “scale.” Also, rather than a Sending Site simply transferring its normal development

rights to a Receiving Site, it can transfer two times that amount, thereby increasing density and height compared to the number of square feet preserved at a Sending Site. The actual effect of the ordinance increases the overall scale of buildings in Ketchum and actually decreases open areas.

In sum, the City is not granted the authority under Section 67-6515A to protect historic buildings, and the ordinance was not enacted to and does not protect open space, wildlife or critical areas. Thus, Ordinance 1034 exceeds the authority granted under Section. 67-6515A and is void.

2. The Historic Preservation Act applies to the preservation of historic sites but Ordinance 1034 does not comply with the Act.

The City's reliance on the Historic Preservation Act to justify Ordinance 1034 fails also since the Ordinance does not comply with the requirements set forth in the Act.

Idaho Code § 67-4619 of the Historic Preservation Act is the only section of the Act that authorizes the transfer of development rights. That Section is entitled "Transfer of Development Rights." Section 67-4619 reads:

Any county or city governing body may establish procedures authorizing owners of designated historic properties to transfer development rights in such amounts and subject to such conditions as the governing body shall determine. For the purposes of this section, "development rights" are the rights granted under applicable local law respecting the permissible bulk and size of improvements erected thereon.

(Emphasis added).

Idaho Code § 67-4614 of the Act is entitled "Designation as Historic Property." Section 67-4614 expressly authorizes a city to "adopt an ordinance designating one or more historic properties" but also mandates that "[i]n order for any historic property to be designated in the ordinance, it must in addition meet the criteria established for inclusion

of the property in the national register of historic places.” Section 67-4614 reads as follows:

The local governing body of any county or city may adopt an ordinance designating one (1) or more historic properties on the following criteria: historical, architectural, archeological and cultural significance; suitability for preservation or restoration; educational value; cost of acquisition, restoration, maintenance, operation or repair; possibilities for adaptive or alternative use of the property; appraised value; and the administrative and financial responsibility of any person or organization willing to underwrite all or a portion of such costs. **In order for any historic property to be designated in the ordinance, it must in addition meet the criteria established for inclusion of the property in the national register of historic places.** For each designated historic property, the ordinance shall require that the waiting period set forth in section 67-4615, Idaho Code, be observed prior to its demolition, material alteration, remodeling or removal. The ordinance shall also provide for a suitable sign or marker on or near the property indicating that the property has been so designated; provided however, that nothing in this chapter shall authorize or be construed to allow the designation, regulation, conditioning or restriction by ordinance or other means of any property or facility owned by the state of Idaho.

(Emphasis added).

The plain language of these statutes is unambiguous. The Idaho legislature has granted cities authority for the transfer of development rights of properties that meet the criteria for listing in the National Register of Historic Places.

In this case, the Ordinance does not satisfy statutory requirements for several reasons. First, there is no independent Ordinance designating historic sites.

Second, even if the TDR Ordinance could be construed as an Ordinance designating historic sites, the Ordinance is still defective because most of the designating sending sites do not meet the requirements for being included on the National Register of Historic Places. There is no dispute that of the 22 designated Sending Sites in Ordinance 1034, only four meet the criteria for inclusion of the property in the National Register of

Historic Places. (*Robrahn Depo.*, Tr. p. 38, l. 15 – p. 39, l. 19; p. 43, l. 44 – p. 44, l. 22).

No other Sending Sites meet the criteria. (*Id.*)

While the City could designate these four sites as historic properties and permit the transfer of the development rights associated with these properties, Section 67-4619 does not authorize the transfer of development rights of other than “designated historic properties.”⁶

Finally, there is no provision in the Ordinance for signing or marking of designated historic sites. Again, Section 67-4614 requires that the “ordinance shall also provide for a suitable sign or marker on or near the property indicating that the property has been so designated.”

The District Court has previously suggested that Section 67-4612 could provide authority for Ordinance 1034. The District Court’s interpretation is wrong because it does not comply with the basic rules of statutory construction. Here, Section 67-4619 is the specific statute in the Historic Preservation Act that authorizes the transfer of development rights. It authorizes such transfers for “designated historic properties.” The use of the phrase “designated historic properties” can only be interpreted as intentional considering that the title of Section 67-4614 is “Designation as Historic Property” and the title of Section 67-4615 is “Procedure for designation.” Section 67-4614 also expressly limits “designation” to those properties that meet the criteria for listing on the National Register of Historic Places. Given the rules of construction, the Court should not ignore

⁶ The ability of the City to designate these four sites again depends on whether the City adopted a valid Ordinance designating the historic sites. In this case, there is no such Ordinance.

the intentional use of the term “designate” in Section 67-4619 authorizing the transfer of development rights for “designated historic properties.”

Furthermore, to interpret Section 67-4612 to authorize cities to permit the transfer of development rights to any non-listed property, would elevate a vague and general statute over a more limited specific one. Since the legislature has adopted a statute, which specifically addresses the transfer of development rights with respect to designated historic properties, that statute controls over Section 67-4612.

Also, interpreting Section 67-4612 as a separate grant of authority to a city to enact a transfer of development rights ordinance with respect to any non-listed property not only ignores the plain and specific language of Sections 67-4619 and 67-4614, it essentially nullifies them. The broad interpretation suggested by the District Court would essentially obliterate and render the entire Act meaningless as any city could, via Section 67-4612, do whatever it desired in regard to historic properties.

Finally, the legislative history for the Historic Preservation Act shows that Section 67-4612 was not intended to be a broad grant of authority to transfer development rights in addition to the authority to do so under Section 67-4619. (*Affidavit of Kathleen Rivers*, Exhibit 2.) The title for the Act as presented in House Bill 96, sets forth a separate clause referring to each individual statute in the Act in the order they appear in the Act. (*Id.*) The clause referring to Section 67-4612 is called “Providing for special restrictions that may be required by local ordinances.” (*Id.*) The section referring to 67-4619 is called “Providing for transfer of development right.” (*Id.*) The two sections are distinguishable.

Also, Section 67-4612 as first drafted included the provision “[s]uch ordinances, special conditions and restrictions, may include appropriate and reasonable control of the

use or appearance of adjacent or associated private property within the public view or both." (*Id.*) This language was deleted in the amendments but indicates that the type of restrictions intended by the legislature involved use and appearance of property rather than a further grant of authority to transfer development rights.

Contrary to the interpretation suggested earlier by the District Court, a more reasonable way of interpreting Section 67-4612, and one which not only abides by all of the rules of statutory construction but is supported by the legislative history, is to interpret the statute as allowing cities to enact further restrictions on the use and appearance of historic properties that are similar to but not in conflict with those conditions and restrictions already enumerated in the Act. The Act restricts what can and cannot be done to properties within a historic district and conditions such modifications on "certificates of appropriateness." I.C. § 67-4608. It also sets forth conditions on changes in use of such properties. I.C. § 67-4609.

The Act also restricts repairs and maintenance on properties in historic districts to those, which do not involve a change in design, material, color or outer appearance, and it, conditions repairs that do involve such changes on certification by the building inspector that they are needed for safety reasons. Idaho Code § 67-4611. The Act imposes similar restrictions and conditions on designated historic properties. Idaho Code § 67-4616. It does not strain the rules of construction nor does it do violence to the other statutes to interpret Section 67-4612 as allowing cities to impose other similar conditions and restrictions on modifications to or demolition of historic properties. Such an interpretation would be consistent with the other provisions of the Act and not nullify them altogether.

In short, a reasonable reading of the Act is that it establishes two ways to protect historic properties: (1) by way of the creation of a historic district, Section 67-4607; or (2) by way of individual designation, Section 67-4614. Individually designated properties, which by the statute are limited to those eligible for listing on the National Register, are also eligible for the transfer of development rights. I.C. § 67-4619. Cities may impose special conditions and restrictions on historic properties as long as they are not in conflict with those outlined in the other provisions of the Act.

As for Ordinance 1034, it authorizes the transfer of development rights for twenty-two properties, only four of which meet the criteria for inclusion on the National Register of Historic Places. In fact, Ordinance 1034 specifically authorizes sites that do not meet the criteria for inclusion on the National Register of Historic Places to be able to transfer development rights.⁷ Ordinance 1034 also does not contain any of the mandatory conditions and restrictions required under Section 67-4616 that apply to designated historic properties.

For these reasons, Ordinance 1034 exceeds the authority granted in Sections 67-4619 and 67-4614. Therefore, Ordinance 1034 is void.

B. KGF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS.

⁷ Under Ordinance 1034, and contrary to statutory authority, even if a site does not meet the criteria for inclusion on the national register, a designated site may transfer development rights as long as it is:

- i. Representative of traditional Ketchum residential and commercial architecture (pre-Sun Valley Lodge, late nineteenth settlement era or post-Sun Valley Lodge, mid-century vacation home era) [or]
- ii. Representative of traditional Ketchum residential and commercial scale, proportion and/or site orientation [or]
- iii. Representative of Ketchum's community traditions and/or heritage, including but not limited to, mining, railroad, ranching, timber, farming, sheep herding or outdoor recreation; or
- iv. Associated with significant events and/or people of the past, including but not limited to, being a residence or business of an early Ketchum family or resident (1880's to 1940's).

When a city ignores statutes and rules, and parties contest those actions, the prevailing party is entitled to attorney's fees and costs. *See e.g., Fisher v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). Where a city has no authority to take a particular action, it acts without a reasonable basis in fact or law. *Id. citing Moosman v. Idaho Horse Racing Commission*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990). If the city's actions are based upon a reasonable, but erroneous interpretation of an ambiguous statute, then attorney fees should not be awarded, but where a city acts without authority, it is acting without a reasonable basis in fact or law. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007).

In this case, for all the reasons cited above, in adopting Ordinance 1034, especially after becoming aware of the problems with its authority to enact the ordinance, the City acted unreasonably and without a reasonable basis in fact and law. Furthermore, in enacting Ordinance 1034 to protect historic sites, the City also acted without authority under the statutes. Accordingly, KGF is entitled to attorney's fees and costs under I.C. § 12-117 and IAR 41.

VI. CONCLUSION

There is no dispute at all about the facts. All that exists is a question of law for this Court to determine. The question of law is whether the adoption by the City of Ketchum of Ordinance 1034 is authorized by Section 67-6515A or 67-4601 et. seq. Since the preservation of historic sites is not within the authority granted in I.C. 67-6515A, and since Ordinance 1034 does not comply with the mandatory provisions of I.C. 67-4601 et. seq, KGF should be granted judgment on its Complaint for Declaratory

Judgment as a matter of law. Also, the Court should award KGF its attorney fees and costs incurred in these actions.

DATED this 12th day of December, 2008.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: 

Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2008, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
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Ed Lawson
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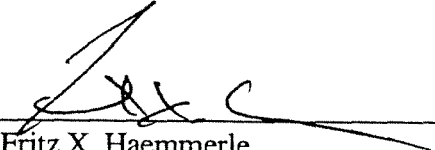
By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

☐

By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

☐

By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.


Fritz X. Haemmerle

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FILED 37
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Attorneys for the Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner/Plaintiff,

vs.

CITY OF KETCHUM, a Municipal
Corporation of the State of Idaho,

Respondent/Defendant.

) Case No. CV-08-837

)
) AFFIDAVIT OF BARRY J. LUBOVISKI
) IN SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT

STATE OF IDAHO,)

) ss.

County of Blaine.)

BARRY J. LUBOVISKI, being sworn upon oath, deposes and states as follows:

1. I am an attorney licensed to practice law in the state of Idaho. I make the averments contained herein of my own personal knowledge and would testify to the facts as presented herein if called upon to do so.

2. A large portion of my practice concerns the representation of applicants (or concerned citizens) before planning and zoning commissions, city councils and boards of

AFFIDAVIT OF BARRY J. LUBOVISKI IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT - 1

county commissioners on development matters. I am also the attorney for the Friedman Memorial Airport Authority, and I have served as a Ketchum City Councilman as well as a Blaine County Commissioner. In all of these capacities, I have had to review and comply with the Local Land Use Planning Act (LLUPA), outlined under Idaho Code Sections 67-6501 through 67-6538. I am well aware of the requirements of the LLUPA.

3. I represented the Plaintiff, KGF Development, LLC ("KGF"), during late 2006, 2007 and 2008 when the City of Ketchum Planning and Zoning Commission and the Ketchum City Council held hearings on both versions of its TDR Ordinances, Ordinance 1005 and 1034.

4. Currently, under Ordinance 1034, there is an application pending by 260 First LLC ("260 First"), for Lots 5, 6 and 7, Block 38, Ketchum Townsite, for a four-story building. The application is filed under Ordinance 1034. The building is directly adjacent to the building currently owned by KGF Development. The applicant proposes to purchase development rights from a Sending Site under the Ordinance. Without the TDR Ordinance, 260 First would not be entitled to build a four-story building.

5. Prior to the adoption of the TDR Ordinances, I am not aware of any four-story building ever being approved or built in Ketchum.

6. Building the four-story building directly adjacent to the building currently owned by KGF Development would cause great or irreparable injury to KGF.

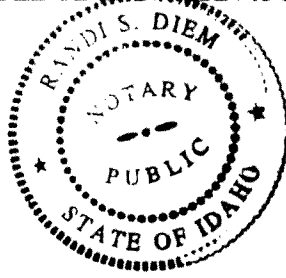
FURTHER YOUR AFFLIANT SAYETH NOT.

DATED this 11th day of December, 2008.


Barry J. Luboviski

AFFIDAVIT OF BARRY J. LUBOVISKI IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT - 2

SUBSCRIBED AND SWORN to before me this 11 day of December, 2008.



Randi S. Diem
NOTARY PUBLIC FOR IDAHO
Residing at: Healy, ID
Commission expires: 11-2-11

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of December, 2008, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
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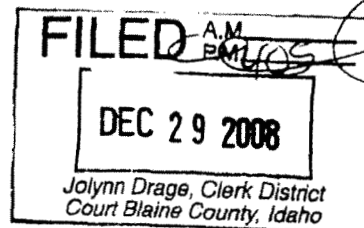
Ed Lawson
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- X By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.
- By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.
- By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.


Fritz X. Haemmerle

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Attorneys for the City of Ketchum



**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

KGF DEVELOPMENT, LLC,

Plaintiff,

vs.

**CITY OF KETCHUM, a municipal
 corporation of the State of Idaho;**

Defendant,

**260 FIRST, LLC, an Idaho Limited
 Liability Company,**

Intervenor.

Case No. CV-08-837

**BRIEF IN OPPOSITION TO
 MOTION FOR SUMMARY
 JUDGMENT**

COMES NOW the City of Ketchum, an Idaho municipal corporation ("Ketchum" or "City"), by and through its counsel of record, Stephanie J. Bonney of Moore, Smith, Buxton & Turcke, Chartered, and hereby submits this Brief in Opposition to Plaintiff's Motion for Summary Judgment pursuant to I.R.C.P. 56(c).

I. INTRODUCTION

The present action is essentially the Plaintiff's attempt to reargue and overturn this

Court's earlier ruling in the "Orders Granting and Denying Motions for Summary Judgment" in the consolidated cases of CV-2007-250 and CV-2008-167, issued on May 5, 2008. In that May 5th ruling, this Court determined that Ordinance #1005, an ordinance the City of Ketchum adopted relating to the transfer of development rights, was not in excess of the City's grant of authority from the Idaho Legislature.

As the Court determined that the notice for the adoption of Ordinance #1005 was defective, Ketchum re-adopted Ordinance #1005 as Ordinance #1034.¹ As it did in the previous cases, in its Motion for Summary Judgment in this case, KGF once again challenges the City's authority to adopt an ordinance allowing the transfer of development rights and ultimately, the City's authority to use TDRs to regulate building height.

II. LEGISLATIVE HISTORY OF ORDINANCE #1034

In 2005, the City of Ketchum determined that potential retail and hotel space in the Community Core District was being permanently lost to single family homes and purely residential projects, established businesses were closing on a regular basis, the local economy was flat, tourism and skier days had plateaued, historic landmarks were being demolished and most of Ketchum's workforce was commuting from far away. City leaders believed that Ketchum was losing its identity as a community.

Accordingly, Ketchum passed an emergency moratorium in its Community Core District and started a community-based effort to restructure that district to revitalize the city. See *Affidavit of Elizabeth Robrahn*, ¶ 4, attached and incorporated as Exhibit A.² Ketchum's first

¹ Ordinance #1034 was almost identical to Ordinance #1005. The City and KGF both agree that the minor discrepancies between the two ordinances are unrelated to KGF's challenge. See KGF's Brief in Support of its Motion for Summary Judgment, Pg. 8, Paragraph 18.

² Robrahn's affidavit was originally filed in Case CV 07-250. It is also incorporated as Exhibit 1 to Robrahn's 9-29-08 deposition. The original attachments to Robrahn's affidavit are not included in this Exhibit A.

step after imposing the moratorium was to hire master planner Tom Hudson of the Tom Hudson Company, to engage the community to develop a master plan. *See Affidavit of Elizabeth Robrahn*, ¶ 6. In the course of over three dozen public meetings, public hearings, design charettes, massing studies, economic analyses and discussion sessions, the community and Tom Hudson developed the Ketchum Downtown Master Plan Framework in January, 2006, (the "Framework"), followed by the Ketchum Downtown Master Plan in July, 2006 (the "Master Plan"). *See Affidavit of Elizabeth Robrahn*, ¶7, ¶8, ¶9.

The Framework and Master Plan inaugurated sweeping changes. Ketchum replaced its entire Community Core Zoning regulations with a form-based zoning code, formed a community development corporation, created an urban renewal agency, purchased land for affordable workforce housing projects and parking lots, created ordinances for inclusionary zoning, designed the Fourth Street Heritage Corridor, built the first two blocks of this substantial streetscape improvement and adopted ordinances encouraging the development of new hotels. More importantly, both the Framework and the Master Plan call for the creation of an ordinance allowing for the Transfer of Development Rights ("TDRs") as a critical component in the revitalization of Ketchum. *See Affidavit of Elizabeth Robrahn*, ¶ 10.

In August, 2005, Claudia Walsworth, M.A. of Walsworth and Associates, Cultural Resource Consultants, prepared an "Archeological and Historic Survey Report" surveying all structures with historic, architectural, archeological or cultural significance located in the City of Ketchum (the "Historic Survey"). *See Affidavit of Elizabeth Robrahn*, ¶ 11. In preparing the first draft of a TDR ordinance, Ketchum Senior Planner Elizabeth Robrahn reviewed the Historic Survey with the Ketchum Historic Preservation Commission. On the basis of that review, the Historic Preservation Commission recommended criteria for TDR sending sites and identified

the properties that it wanted to preserve by designating such properties as TDR sending sites. In evaluating sites, the Commission and the City reviewed factors including the historical, architectural, educational, and cultural significance of the sites. *See Affidavit of Elizabeth Robrahn*, ¶ 12.

Following the course set by the community in the Framework, the Master Plan, and the Historic Survey, in the summer of 2006, Ketchum's Planning and Zoning Department began the long process of creating an ordinance that would employ TDRs for historic preservation. The goal of the ordinance was to give developers and property owners a voluntary incentive to preserve Ketchum's historic buildings by accommodating the financial and market realities of such preservation. This in turn would bolster the declining sense of community and place, maintain a sense of human scale and proportion, encourage new development of commercial space on the ground floor and encourage the development of affordable housing on middle floors. The program only works if developers participate and developers will participate only if they can make a profit. That profit comes from one additional floor of building height.

The basic framework of Ketchum's TDR program is as follows: the owner of a designated historic building, a "sending site", agrees to maintain that building in its present state in perpetuity. In exchange, that owner can sell the additional square footage which could be built if the property were redeveloped. On the other side of the transaction, the owner of a designated receiving site purchases enough square footage to build a limited fourth floor; however, ground floor retail space and affordable work force housing units are required. The historic building is preserved, new retail space is created, additional affordable housing units are built and the developer makes a profit.

KGF is challenging the City's authority to adopt an ordinance allowing the transfer of

development rights and ultimately, the City's authority to regulate building height through the use of TDRs.

III. LEGAL STANDARD

Summary judgment may only be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); Butters v. Hauser, 131 Idaho 498, 500, 960 P.2d 181, 183 (1998); *citing* Friel v. Boise City Housing Authority, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The initial burden of establishing the absence of an issue of material fact is on the moving party. Thompson v. Idaho Ins. Agency, Inc., 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). Disputed facts are liberally construed in favor of the non-moving party, and the Court makes all reasonable inferences in favor of the non-moving party. McCoy v. Lyons, 120 Idaho 765, 769, 820 P.2d. 360, 364 (1991).

IV. ARGUMENT

Idaho cities have the authority to create TDR programs to further planning goals and preserve historic properties under existing statutes, LLUPA and the general police powers granted in the Idaho Constitution.

Although the details of given system may differ as to the particulars, a system of transferable development rights generally restricts the amount of development which may be carried out on a particular parcel of land, but allows the landowner to transfer the unused potential development capacity to another parcel of land for more intense development than would have been possible without such a transfer. Anderson's American Law of Zoning (4th ed.), § 34:13. Thus, there is nothing unique or special about the transfer of development rights. It's merely a tool in which the local government allows more intense development in one area in

exchange for less development in another area. The authority to allow the transfer of development rights is derived directly from the government's authority to regulate land use.

In its Complaint for Declaratory Relief, Plaintiff argues that Ketchum lacks the authority to enact the TDR Ordinance. Specifically, the Plaintiff's lawsuit appears to focus on Ketchum's ability to preserve existing structures by regulating height through the TDR Ordinance. Plaintiff built a 38 foot building and was under the mistaken impression that "no building could be built in the future that would obstruct [its] views." *Affidavit of Kevin G. Fortun*, ¶3, ¶4. In fact, even without the TDR Ordinance, a conditional use permit for planned unit developments could be granted to allow greater building heights than 38 feet. *Affidavit of Fritz Haemmerle, Exhibit 1, City's Response to Request for Admission No. 5.*

Further, the City of Ketchum can clearly change the height regulations pursuant to I.C. §67-6511 to allow a building of essentially any height next to the Plaintiff's building. Regardless of the City's method of regulation, Plaintiff just does not have a legal right to control the height of future adjacent buildings. Instead, Plaintiff argues that the City cannot preserve structures through its TDR Ordinance, and thus allow for increased building heights. It argues that the only type of TDR ordinances that can be adopted must be adopted within very strict confines pursuant to a limited interpretation of §67-6515A or §67-6419.

This argument must fail unless Plaintiff can demonstrate that the City's TDR Ordinance is either in direct conflict with the general laws of the state or that the TDR Ordinance is barred under the doctrine of implied preemption on the basis that the State has entirely "occupied" the field of TDRs. "The concept of 'conflict' broadens when put in the context of a determination of state preemption over a field of regulation. Of course, direct conflict (expressly allowing what the state disallows, and vice versa) is 'conflict' in any sense. *State v. Musser*, 67 Idaho 214, 176

P.2d 199 (1946). Additionally, a 'conflict' between state and local regulation may be implied [under the doctrine of preemption]." Envirosafe Services of Idaho, Inc. v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). In the case at hand, there is no evidence of any such direct conflict and the few state statutes that address TDRs do not even approach the standard necessary for a finding of preemption.

Ketchum, like all cities and counties in Idaho, has two sources of authority empowering it to enact zoning laws. The first source is the Idaho Constitution, Article XII, Section 2:

LOCAL POLICE REGULATIONS AUTHORIZED. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

The Idaho Supreme Court has interpreted this Constitutional provision as a source of authority empowering cities to enact zoning regulations. Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 661 P.2d 1214 (1983); citing Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977); Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 562, 468 P.2d 290, 294 (1970). Thus, the Idaho Constitution grants plenary police power to counties and cities so long as their enactments "are not in conflict with [the city or county's] charter or the general laws. See City of Idaho Falls v. Grimmett, 63 Idaho 90, 93, 117 P.2d 461, 464 (1941) (It should be remembered that the adoption of zoning ordinances, and the regulation of construction of building in various zones or districts, is the exercise of the *police power* of the municipality and is *purely governmental*") (emphasis in original). The police power includes the power to zone. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50 (1928).

The second source of authority to enact zoning regulations is the Local Land Use

Planning Act ("LLUPA"), which actually requires Idaho's cities and counties to zone. See I.C. § 67-6503. Further, within its zoning districts, Idaho's cities and counties "shall where appropriate, establish standards to regulate and restrict the height, number of stories . . ." See I.C. § 67-6511.

Like the Idaho Constitution, LLUPA cites the exercise of police powers as its purpose in I.C. § 67-6502:

PURPOSE. The purpose of this act shall be to promote the health, safety, and general welfare of the people of the state of Idaho as follows:

- (a) To protect property rights while making accommodations for other necessary types of development such as low-cost housing and mobile home parks.
- (b) To ensure that adequate public facilities and services are provided to the people at reasonable cost.
- (c) To ensure that the economy of the state and localities is protected.
- (d) To ensure that the important environmental features of the state and localities are protected.
- (e) To encourage the protection of prime agricultural, forestry, and mining lands for production of food, fibre, and minerals.
- (f) To encourage urban and urban-type development within incorporated cities.
- (g) To avoid undue concentration of population and overcrowding of land.
- (h) To ensure that the development on land is commensurate with the physical characteristics of the land.
- (i) To protect life and property in areas subject to natural hazards and disasters.
- (j) To protect fish, wildlife, and recreation resources.
- (k) To avoid undue water and air pollution.
- (l) To allow local school districts to participate in the community planning and development process so as to address public school needs and impacts on an ongoing basis.

The Idaho Supreme Court has acknowledged that this grant of authority is broad. "[i]n enacting [LLUPA], the legislature obviously intended to give local governing boards, such as the Kootenai County Commissioners, broad powers in the area of planning and zoning. Worley Highway Dist. v. Kootenai County, 104 Idaho 833, 835, 663 P.2d 1135, 1137 (Ct. App.1983). In fact, this grant of authority is so broad that there does not appear to be a single case where the Idaho Supreme Court overturned a zoning ordinance because the ordinance exceeded the grant of

authority. The Court has found ordinances to be illegal or unconstitutional based upon procedural deficiencies, being in conflict with the general laws or being barred by the doctrine of implied preemption, but not simply for exceeding the grant of authority.

In other words, as long as an ordinance is based on a valid exercise of police powers, the only restriction on a city's power to zone is that the zoning ordinances follow required procedure and not, "be in conflict with [the city's] charter or with the general laws." Idaho Const., Art. XII, Sec.2. Plaintiff has not asserted that the TDR Ordinance is in conflict with the charter or general laws of the state. Rather, Plaintiff has asserted only an implied conflict that can be prohibited only under the doctrine of preemption if Plaintiff can demonstrate that I.C. § 67-6515A and I.C. § 67-4601 *et seq.* so fully "occupy the field" of TDRs for historic preservation as to exclude Ketchum's TDR Ordinance.

The doctrine of preemption does not apply because the Idaho Legislature has given no indication that it intended to fully "occupy the field" of TDRs for historic preservation.

Neither LLUPA nor I.C. § 67-4601 *et seq.* "Preservation of Historic Sites" indicate any intent on the part of the state legislature to so fully occupy the field of TDRs for historic preservation as to prohibit Ketchum from enacting the TDR Ordinance. The Idaho Supreme Court has established the doctrine of implied preemption as follows:

Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state. [Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980)]. See also, United Tavern Owners of Philadelphia v. School District of Philadelphia, 441 Pa. 274, 272 A.2d 868 (Pa. 1971); Boyle v. Campbell, 450 S.W.2d 265 (Ky. 1970); In re Hubbard, 62 Cal.2d 119, 396 P.2d 809 (Cal. 1964).

The doctrine of implied preemption typically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities,

the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.

'The [local governmental entity] cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern.' Caesar, 101 Idaho at 161, 610 P.2d at 520.

Envirosafe Services of Idaho, Inc. v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); quoting Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980).

In Envirosafe, Owyhee County attempted to regulate hazardous waste facilities by way of county ordinance even though a comprehensive state-level regulatory scheme was already in effect. In striking down the local ordinance on the basis of implied preemption, the Court considered the language of state statutes, the comprehensiveness of the state regulatory scheme created by those statutes and the unique nature of hazardous waste as needing exclusively state-level control. The significant statutory language reads as follows:

'The legislature intends that the State of Idaho enact and carry out a hazardous waste program that will enable the state to assume primacy over hazardous waste control from the federal government....' [I.C. § 39-4404].

I.C. § 39-4405 further provides that the Board of Health and Welfare 'adopt such rules and regulations as are necessary and feasible for the management of post generation handling, collection, transportation, treatment, storage and disposal of hazardous wastes *within the state*.' Importantly, I.C. § 39-4419 reads:

'The director [of the Idaho Department of Health and Welfare] shall have the power and the duty to encourage cooperative activities between the department and other states for the improved management of hazardous wastes, and so far as is practical, *to provide for uniform state regulations* and for interstate agreements relating to hazardous waste management.'

All of the above-cited code sections evince a strong legislative intent that regulation of the field of hazardous waste disposal be regulated by means of one, uniform statewide scheme enabling this state to enter into meaningful interstate agreements.

Id. at 1001 (emphasis in original decision but not in original statute).

I.C. § 67-4601 does contemplate a "comprehensive program of historic preservation";

however, such program shall be "undertaken at all levels of the government of this state and its political subdivisions" Far from excluding municipalities by implication, this statute specifically includes them. LLUPA's mandate is even more specific. "Every city and county shall exercise the powers conferred by this chapter." See I.C. § 67-6503. This inclusive language exists because both statutes require that the regulatory scheme be created at the local level. See I.C. § 67-6515A and I.C. § 67-4619.

Moreover, these two statutes create only broad parameters and minimal restrictions to which a local government must comply if that local government exercises the grant of authority contained in these two sections. Unlike these broad parameters and minimal restrictions set forth in the two statutes, in Envirosafe, the Court found that the regulatory scheme was so comprehensive as to leave no room for local regulation of the same subject matter.

[The state regulations constitute] a comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field. The [Hazardous Waste Management Act, I.C. §§ 39-4401 - 4432] provides for regulation, trip permits and a manifest system for those who transport hazardous waste (I.C. §§ 67-2929-30 and I.C. § 39-4410); it further regulates a permit system for hazardous waste facilities (I.C. § 39-4409) and provides recording and reporting requirements for generators and facilities (I.C. § 39-4411, 39-4429); fee systems and dedicated funds for emergency responses, and monitoring (I.C. §§ 39-4417, 4410 and 39-4427) are also provided. There are also code sections dealing with citizen suits (I.C. § 39-4416), local governmental notice (I.C. § 39-4418), interstate cooperation (I.C. § 39-4419), employment security (I.C. § 39-4420), as well as broad enforcement provisions (I.C. § 39-4413).

The HWMA speaks for itself. This state's legislature has acted in an all-encompassing fashion towards regulating the field of hazardous waste disposal.

Id. at 690.

No such all encompassing and comprehensive regulatory scheme exists with respect to TDRs. LLUPA contains only a single passage addressing TDRs - I.C. § 67-6515A. That statute delegates the creation of the regulatory scheme to the local government and states only that the

local government may create development rights and authorize landowners to transfer such rights subject to such, "conditions as the governing body shall determine to fulfill the goals of the city or county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of land with contiguity to agricultural lands suitable for long-range farming and ranching operations. . . ." See I.C. § 67-6515A(1)(a).

I.C. § 67-6515A is perhaps more significant for what it does not state. It does not state that TDRs shall be used only for agricultural preservation purposes and for no others. The passage does set forth several requirements and restrictions. For instance, the program must be voluntary, a market analysis must be performed prior to designating sending and receiving areas and acquisition of TDRs may not be made a condition of approval; however, these requirements are far from a comprehensive regulatory scheme. Especially when viewed with the broad grant of power to regulate land use invested by the Idaho Constitution and the other provisions of LLUPA.

Contrary to the claims of the Plaintiff, the legislative history for §67-6515A does not make it clear that the statute was intended to only allow TDRs to apply to open space and agricultural lands. In fact, both the House Statement of Purpose and the Minutes of March 1, 1999, refer to a program "to protect significant land resources while compensating the property owner." *Affidavit of Kathleen Rivers, Exhibit 1*. Further, even if §67-6515A only applies to agricultural lands and open space, there is nothing in the legislative history that even suggests the Legislature intended to preempt the field of TDRs. Rather, several of the representatives refer to the statute merely as a "voluntary tool." *Affidavit of Kathleen Rivers, Exhibit 1, Minutes of March 15, 1999*. Such a voluntary tool coexists along with other such tools provided and authorized in the Idaho Constitution and LLUPA.

In similar fashion, I.C. § 67-4601 *et seq.* discusses TDRs in only a single section - I.C. § 67-4619. Like LLUPA, I.C. § 67-4619 leaves the entire regulatory scheme, "subject to such conditions as the [local government] shall determine." It is important to note that I.C. § 67-4614 applies only to properties which meet the criteria established for inclusion in the national register of historic places. Accordingly, I.C. § 67-4601 *et seq.* establishes a comprehensive program that provides both for the preservation of properties eligible inclusion in the national register and for the preservation of other historic properties that can be regulated pursuant to I.C. § 67-4612 and I.C. § 67-4613.

Similar to I.C. § 67-6515A, there is nothing in the legislative history of Title 67, Chapter 46 that even hints at an intent to occupy the TDR field. In fact, the Plaintiff has not provided any evidence of the substance of any discussions concerning the bill. The House Statement of Purpose for the Preservation of Historic Sites merely references "conserving historic properties for the education, pleasure, and enrichment of the citizens of the State." *Affidavit of Kathleen Rivers, Exhibit 2, HS2128 Statement of Purpose*. I.C. § 67-4602 defines historic properties in a way that clearly encompasses much more than just sites eligible for designation on the national register of historic places. Consequently, the Plaintiff is unable to provide any evidence in the legislative history that the legislature intended to limit the land use regulatory powers granted through the Idaho Constitution and LLUPA with the Historic Preservation Act.

Moreover, the plain language of I.C. § 67-4612 explicitly rejects any claim of implied preemption by specifically preserving the city's power or authority to regulate by planning or zoning laws and local laws and regulation, and empowering the city to provide by ordinances, special conditions or restrictions for the preservation of historic properties. If § 67-4614 is interpreted as limiting the City's ability to protect historic properties to only those eligible for the

national register of historic places, I.C. § 67-4612, I.C. § 67-4613, and I.C. § 67-4602 are rendered entirely superfluous. Rather, a reasonable interpretation of all of the statutes in Title 67, Chapter 46 provides for the *comprehensive program* referred to I.C. § 67-4601, which includes multiple classes of properties and a broad grant of authority to the City to protect historic properties.

In Caesar, a prior decision on which the Court relied heavily in deciding Envirosafe, the plaintiff was injured while exiting Bronco Stadium after watching a football game. Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980). Alleging negligence per se on the grounds that the stadium failed to meet the minimum requirements of the City of Boise's building code, the plaintiff sued the state of Idaho as the owner of the stadium. The Court held that the state is not subject to the city's building code because the applicable state statutes taken as a whole, "indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature." Id. at 162.

The Caesar Court found it significant that former I.C. § 67-2304 empowered the Commissioner of Public Works to ensure the safe construction of public buildings subject to the approval of the Permanent Building Fund Council. The Court found the language of that statute to be even more compelling. "Since the purpose of Title 67, Chapter 23, as expressly stated in I.C. § 67-2311 was 'to render all public buildings now or hereafter owned or maintained by the state of Idaho, or any official, department, board, commission or agency thereof reasonably free from hazards to the general public, we deem that the legislature intended to allocate this police power to the state in its concern for the safety of the general public.'" Id. at 161. In contrast, the language in I.C. § 67-6515A and I.C. § 67-4601 *et seq.* does not even imply such exclusivity and there is no evidence of any such legislative intent in the case at hand.

In Caesar, there was a comprehensive regulatory scheme, overlapping laws and overlapping regulatory agencies to the point of redundancy and conflict. However, state and local laws may overlap so long as the state has not "acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation." An example of such permissive overlapping may be found in Benewah County Cattlemen's Ass'n. Inc. v. Board of County Com'rs of Benewah County, 105 Idaho 209, 668 P.2d 85 (1983). In Benewah County Cattlemen's Assc., the plaintiff argued that a county ordinance prohibiting livestock from running at large was preempted by Idaho's herd district statutes, I.C. § 25-2401 et seq. The Court disagreed holding that the, "extension or amplification of that control by county ordinance is not prohibited in the absence of constitutional or statutory provisions clearly evidencing intent on a statewide basis to permit livestock to freely roam and graze regardless of the ownership or the character of lands." Id. at 213. As demonstrated, a local government may further restrict an activity already restricted by the state so long as the state legislature has not indicated its intent to occupy the field. To the same degree, a local government may expand upon a broad grant of authority from the state as is the case of the City's TDR Ordinance and Benewah County's livestock ordinance.

The City's TDR Ordinance does not attempt to restrict the use of TDRs in excess of the state restrictions. Rather, the TDR Ordinance attempts to create opportunities for land owners in an area of regulation addressed only in part by the state. Although the sending sites are neither agricultural in nature nor eligible for the national historic registry, they are still historically significant to the community. Moreover, historic preservation is only one goal of the TDR Ordinance. The TDR Ordinance also attempts to work in conjunction with other Ketchum Ordinances to stimulate the economy, preserve critical ground-floor retail space and create

affordable housing. In summary, neither I.C. § 67-6515A nor I.C. § 67-4601 *et seq.* imply any intent on the part of Idaho's legislature to so fully regulate the use of TDRs as to fully occupy the field to the exclusion of the City's TDR Ordinance. Instead, the only statutes relating to TDRs have granted authority to use TDRs, not restricted it.

V. ATTORNEY FEES.

In civil judicial proceedings against a city, the Court may award reasonable attorney fees to the prevailing party only if the opposing party acted without a reasonable basis in fact or law. I.C. § 12-117. If the issue is one of first impression, then a party did not act without a reasonable basis in fact or law. SE/Z Const., L.L.C. v. Idaho State University, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004). Kootenai Medical Center v. Bonner County Com'rs, 141 Idaho 7, 105 P.3d 667 (2004).

The case at hand raises an issue of first impression. Whether or not I.C. § 67-6515A or I.C. § 67-4601 *et seq.* preempt the use of TDRs for historic preservation has never been addressed by the Idaho Supreme Court.

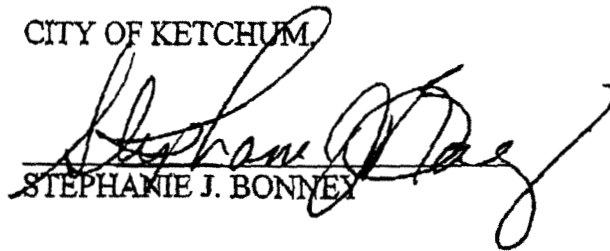
Attorney's fees are inappropriate if the City presented a legitimate question for this Court to address. IHC Hospitals, Inc. v. Teton County, 139 Idaho 188, 191-92, 75 P.3d 1198, 1201-02 (2003). "Here, a legitimate question was presented as to what constitutes an application or delayed application; therefore, we deny an award of fees to the County." Id. at 192. In the case at hand, the Parties ask whether Idaho's municipalities have the power to use TDRs preserve structures that, although not eligible for the national historic registry, are valued by the local community for their historic attributes. Because this case involves an issue of first impression and because the parties present a legitimate question for the Court's determination, Ketchum acted with a reasonable foundation in fact and law and attorney fees should not be awarded.

VI. CONCLUSION.

Ketchum's authority to create an ordinance using TDRs for historic preservation is based on the broad grant of authority contained in LLUPA and the Idaho Constitution, Art. XII, Sec.2. The TDR Ordinance is not in direct conflict with the general laws of the state nor is there any implied conflict based upon the doctrine of preemption. Simply put, there is no indication that the Idaho Legislature intended to so fully "occupy the field" of TDRs as to exclude any ordinance employing TDR's for purposes other than those addressed in I.C. § 67-6515A or I.C. § 67-4601 *et seq.* For these reasons, Ketchum asks this Court to deny Plaintiff's Motion for Summary Judgment.

DATED this 29th day of December, 2008.

CITY OF KETCHUM



STEPHANIE J. BONNEY

CERTIFICATE OF SERVICE

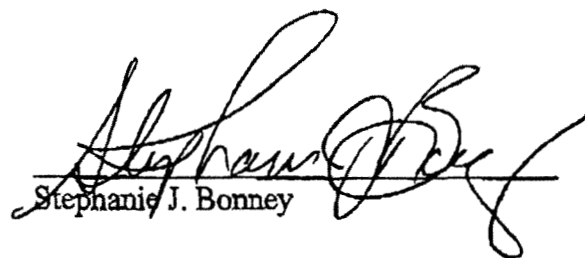
I hereby certify that a true and correct copy of the foregoing DEFENDANT KETCHUM'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was this 29th day of December, 2008 served upon the following individuals and in the corresponding manner:

Michael Pogue
Lawson & Laski, PLLC
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Ketchum, ID 83340

Method: Facsimile 208-725-0076

Fritz X. Haemmerle
Haemmerle & Haemmerle, PLLC
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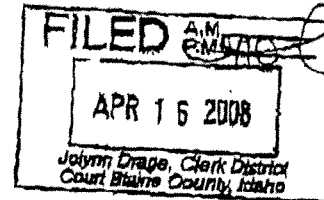


Stephanie J. Bonney

EXHIBIT A

Ketchum's Brief in Opposition to Plaintiff's Motion for Summary Judgment - 19

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Attorney for Respondent/Defendant: City of Ketchum

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner/Plaintiff,

v.

CITY OF KETCHUM, a Municipal
Corporation of the State of Idaho; and
260 FIRST STREET, LLC, an Idaho limited
liability company,

Respondents/Defendants.

Case No.: CV-07-250

AFFIDAVIT OF ELIZABETH ROBRAHN
IN SUPPORT OF CITY OF KETCHUM'S
BRIEF IN RESPONSE TO MOTION FOR
SUMMARY JUDGMENT

(IRCP 56(c))

STATE OF IDAHO)
)ss.
County of Blaine)

I, ELIZABETH ROBRAHN, being first duly sworn upon oath, depose and say:

1. I make this Affidavit based upon my own personal knowledge and belief.
2. I am over 18 years of age and competent to testify to the matters set forth herein if called upon to do so.
3. I was employed as a Senior Planner in the Ketchum Planning and Zoning Department from June 20, 2005 to August 1, 2007.

AFFIDAVIT OF ELIZABETH ROBRAHN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT. - 1

Ketchum's Brief in opposition to Plaintiff's Motion for Summary Judgment - 20

4. Due to a rapidly deteriorating Commercial Core District and the need for economic revitalization, Ketchum passed Ordinance No. 971 on October 11, 2005.
5. Ordinance No. 971 is an emergency moratorium prohibiting the issuance of building permits in the Community Core District for single family homes and developments containing residential uses on the ground floor. A true and correct copy of Ordinance No. 971 is attached hereto as Exhibit A.
6. Shortly after passing Ordinance No. 971 and as part of the revitalization effort, on October 18, 2005, Ketchum passed Resolution No. 05-099. Resolution No. 05-099 authorizes the City to enter a contract for services with the Tom Hudson Company to prepare a master plan for the economic revitalization of Ketchum's Community Core District. A true and correct copy of Resolution No. 05-099 is attached hereto as Exhibit B.
7. Based upon a substantial public outreach program, the Tom Hudson Company produced a "Downtown Ketchum Master Plan Framework" in January, 2006, which recommends the use of TDRs as one method to revitalize Ketchum's Community Core District. A true and correct copy of the Ketchum Downtown Master Plan Framework is attached hereto as Exhibit C.
8. Continuing with the public outreach program and adding significant detail to the Framework, the Tom Hudson Company produced a "Downtown Ketchum Master Plan" in July, 2006, which recommends TDRs as one method to revitalize Ketchum's Community Core District. A true and correct copy of the "Downtown Ketchum Master Plan is attached hereto as Exhibit D.

AFFIDAVIT OF ELIZABETH ROBRAHN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT - 2

9. In total, the Tom Hudson Company assisted the City in conducting over three dozen public meetings, public hearings, interviews, design charrettes, massing studies and economic analyses to prepare the Ketchum Downtown Master Plan and Framework.
10. I was the Ketchum planner with primary responsibility for preparing a TDR ordinance as called for in the Ketchum Downtown Master Plan and Framework.
11. In August, 2005, Claudia Walsworth, M.A. of Walsworth and Associates, Cultural Resource Consultants, prepared an "Archeological and Historic Survey Report" surveying all structures with historic, architectural, archeological or cultural significance located in the City of Ketchum (the "Historic Survey"). A true and correct copy of the Historic Survey is attached hereto as Exhibit E.
12. In preparing the first draft of a TDR ordinance, I reviewed the Historic Survey with the Ketchum Historic Preservation Commission. On the basis of that review, the Historic Preservation Commission recommended criteria for TDR sending sites and identified the properties that it wanted to preserve by designating such properties as TDR sending sites. In evaluating sites, the Commission and the City reviewed factors including the historical, architectural, educational, and cultural significance of the sites. Please see Staff Report dated December 11, 2006, a true and correct copy of which is attached hereto as Exhibit F.
13. The owners of all proposed "sending" and "receiving" sites received advance written notification of their property's proposed designation. Please see my letter dated February 7, 2007, a true and correct copy of which is attached hereto as Exhibit G. The list of individuals to whom this letter was mailed is contained in the "Council and P & Z Legal Notices" section of the administrative record on file in this action.

AFFIDAVIT OF ELIZABETH ROBBAHN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Ketchum's Brief in opposition to Plaintiff's Motion for Summary Judgment 22


14. Ketchum conducted more than five public hearings before the Planning and Zoning Commission and three public hearings before the City Council to consider the TDR section of the ordinance amending the Community Core chapter of the zoning ordinance in an effort to pass such ordinance prior to the vote in November, 2006 on Proposition 2, a statewide initiative that proposed to substantially limit planning and zoning activities.
15. The City Council Members tabled the TDR section of the ordinance because it was not ready for adoption on October 30, 2006, the last opportunity to pass planning ordinances prior to the vote on Proposition 2.
16. At several of such public hearings, I delivered a power point presentation demonstrating both the specific properties recommended by the Historic Preservation Commission and the location of such properties in Ketchum. A true and correct print copy of such power point presentation is attached hereto as Exhibit H.
17. In November, 2006, Ketchum began the process of adopting a TDR ordinance all over again. In preparing the draft ordinance and staff reports, I used the Historic Survey and recommendations from the Historic Preservation Commission to prepare my staff reports.
18. The City conducted a market analysis prior to designating sending and receiving areas which is attached to the agency record on file in this action behind the tab entitled "TDR Analysis" and is further set forth in my staff report dated December 7, 2006 for the Planning and Zoning Commission's public hearing on that date and in my staff report dated January 16, 2007 both of which are part of the agency record on file in this action.
19. The Ketchum Planning and Zoning Commission conducted two (2) public hearings to consider the draft TDR Ordinance.

AFFIDAVIT OF ELIZABETH ROBBAEN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT - 4

20. True and correct copies of the notices for such public hearings are attached hereto as Exhibits I and J
21. A true and correct copy of the Planning and Zoning Commission's recommended TDR Ordinance is attached hereto as Exhibit K.
22. The Ketchum City Council conducted four (4) public hearings to consider the draft TDR Ordinance.
23. True and correct copies of the notices for such public hearings are attached hereto as Exhibits L, M, N and O.
24. In the course of such public hearings, the Ketchum City Council adjusted the square footage of TDRs that could be sent, reduced the number of sending sites and increased the number of receiving sites in order to avoid potential spot zoning and to ensure more demand than supply.
25. The City Council adopted Ordinance No. 1005 on February 22, 2007 and published it in the Idaho Mountain Express on February 28, 2007.
26. A true and correct copy of Ordinance No. 1005 is attached hereto as Exhibit P.
27. The staff reports that I prepared for such public hearings on Ordinance No. 1005 are part of the agency record in this action at the following tabs: P&Z Meeting December 7, 2006, P&Z Meeting December 11, 2006, Council Meeting January 16, 2007, Council Meeting February 5, 2007 and Council Meeting February 20, 2007.

FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 16 day of April, 2008.



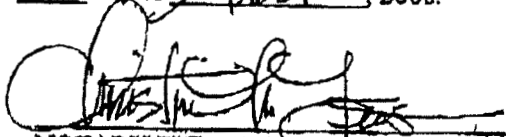
ELIZABETH ROBRAHN

AFFIDAVIT OF ELIZABETH ROBRAHN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT - 5

Ketchum's Brief in Opposition to Plaintiff's Motion for Summary Judgment - 24

SUBSCRIBED AND SWORN TO before me this 10th day of April, 2008.



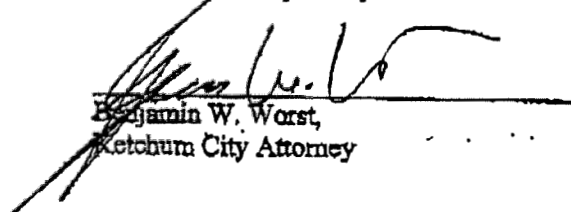

NOTARY PUBLIC FOR IDAHO

Residing at: Hamlet, ID

My Commission Expires: 7/29/08

CITY OF KETCHUM,

An Idaho municipal corporation


Benjamin W. Worst,

Ketchum City Attorney

AFFIDAVIT OF ELIZABETH ROBRAHN IN SUPPORT OF CITY OF KETCHUM'S BRIEF IN
RESPONSE TO MOTION FOR SUMMARY JUDGMENT - 6

Ketchum's Brief in Opposition to Plaintiff's Motion for Summary Judgment - 25

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FILED 4:52 PM
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District
Clerk

Attorneys for Intervenor 260 First LLC

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner-Plaintiff

vs.

CITY OF KETCHUM, a municipal corporation
of the State of Idaho

Respondent-Defendant.

260 FIRST LLC,

Intervenor.

Case No.: CV-08-837

**260 FIRST'S OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

KGF has been attempting to sell several multi-million dollar penthouses on the top-floor of its Copper Ridge building. The penthouses were built with extensive west-facing windows with "Baldy" views. *See* KGF's Statement of Facts, No. 4. It was never anticipated that new zoning on adjacent properties might impact the Baldy views, and "[t]he views were expected to be and have been a major selling point for the Copper Ridge penthouses." *Id.*

It is not disputed that the Baldy views add value to the penthouses. (Although not

pertinent to this motion, the parties *do* dispute the nature of the detrimental impact that the 260 First Project will actually have on the views). It is also undisputed that KGF never took any action to preserve its views in perpetuity by purchasing the adjoining property, purchasing easements, etc.

Instead, KGF seeks to preserve its penthouse views by attacking City legislation that would allow 260 First to build a fourth floor. This legislation, Ketchum TDR Ordinance No. 1034, was designed in part to address the severe development challenges facing the City of Ketchum, including the deteriorating Commercial Core District and the need for economic revitalization. *See Affidavit of Elizabeth Robrahn in Support of City of Ketchum's Brief in Response to Motion For Summary Judgment*, ¶ 4. However, as set forth below and in the City of Ketchum's *Brief in Opposition to Motion for Summary Judgment*, the City adopted the TDR Ordinance with all lawful authority. KGF has not (and cannot) provide any legal authority for its proposition that because the TDR Ordinance in question varies to the slightest degree from the legislature's grant of authority it must be automatically "null and void."

STATEMENT OF FACTS

260 First is an owner of the real property Lots 5, 6, 7, Block 38, Ketchum Townsite, commonly known as 260 First Avenue, located at Sun Valley Road and First Avenue. This Property is directly west of the Copper Ridge Condominiums, located at Second Street and Washington Ave., owned by Petitioner-Plaintiff KGF Development, LLC. Affidavit of Scott Roberts ("Roberts Aff."), ¶ 2¹ In February 2008, 260 First began construction on this site of a four-story, 47,000 square foot retail and residential building at 260 First Avenue consisting of 22 market-rate condominiums and seven deed-restricted affordable units as well as approximately

¹ 260 First incorporates by reference the *Affidavit of Scott Roberts in Opposition to Motion for Summary Judgment*, filed on April 17, 2008, in Blaine County Cases CV-07-250 and CV-08-167.

6,500 square feet of ground floor retail and a 15,287 square foot sub-grade parking garage (the "Project"). *Id.* ¶ 3

In designing and developing the Project, 260 First has relied on the Ketchum Transferable Development Right (TDR) Ordinances. On February 22, 2007, the City enacted its first TDR Ordinance, No. 1005. In the TDR system, certain sites are designated as "sending sites" and have development rights to sell. Property owners in "receiving sites" can buy those rights to create greater density in other parts of town. The TDR Ordinance provides a mechanism for increasing desired density in the community core while at the same time preserving open-spaces and heritage/historic buildings, providing affordable housing in downtown Ketchum, and providing important ground-floor retail spaces which are recognized as crucial in revitalizing the City's downtown core (commonly referred to by the City of Ketchum as Inclusionary Zoning). *Id.* ¶ 6

Furthermore, there were incentives, designed to offset the additional costs of the Inclusionary Zoning required of the developer, which allow larger buildings capable of generating enough additional revenue to offset the cost of the inclusionary zoning (workforce housing units, street level retail, etc.). Without the incentives, the inclusionary zoning adopted by the city would in actuality be a down-zone from the City's previous zoning code. *Id.* ¶ 7

260 First has been in negotiations with the owner of Memory Park in Ketchum to purchase TDRs which are necessary for the fourth-floor of the Project. Memory Park is an "open-space" park, and a designated sending site. *Id.* ¶ 8. *See also* Affidavit of Brian Barsotti, the attorney for the owner of Memory Park, filed on August 14, 2007.

On or around February 19, 2008 the City enacted Ordinance No. 1034 (the "New Ordinance"), which is substantially similar to the TDR Ordinance No. 1005. This New

Ordinance is the subject of the present suit and Motion for Summary Judgment. In the present motion KGF essentially asks the Court to overturn its May 5, 2008 *Orders Granting and Denying Motions for Summary Judgment*, in the consolidated cases CV-07-250 and CV-07-167. In this Order the Court determined that the City of Ketchum lawfully enacted Ordinance No. 1005, and did not act beyond its authority in doing so.

LEGAL STANDARD

Upon a motion for summary judgment all disputed facts are liberally construed in favor of the non-moving party, and the burden of proving the absence of a material fact rests at all times upon the moving party. *See, e.g., G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). This burden is onerous because even "[c]ircumstantial evidence can create a genuine issue of material fact." *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868-69, 452 P.2d 362, 365-66 (1969).

Moreover, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, a summary judgment must be denied because all doubts are to be resolved against the moving party. *Id.* The requirement that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one. *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988).

ARGUMENT

The TDR Ordinance Does Not Exceed the City's Authority to Regulate Land Use

I. Incorporation by Reference

260 First incorporates by reference as if fully set forth herein the law and argument set

forth in the City of Ketchum's *Brief in Opposition to Plaintiff's Motion for Summary Judgment*.

In particular, the City has authority to create TDR programs to further planning goals and preserve historic properties under existing statutes, LLUPA, and the general police powers granted in the Idaho Constitution.

II. The City Has Authority Under LLUPA to Enact the TDR Ordinance

Idaho Code § 6515A(1)(a) provides in part:

Any city or county governing body may, by ordinance, create development rights and establish procedures authorizing landowners to voluntarily transfer said development rights subject to:

- (a) Such conditions as the governing body shall determine to fulfill the goals of the city or county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations;

It is noteworthy that the section specifically empowers *cities* to enact TDR programs. While cities generally do not have "wildlife habitat" and "agricultural lands" to protect, they do have "open spaces," "critical areas," and other significant land resources worthy of protection via TDR programs. While KGF contends Idaho Code § 6515A cannot be used to protect historic/open-space properties, this argument is not supported by the by the language or intent of the statute.

The enumeration of purposes for TDRs set forth in Idaho Code § 6515A(1)(a) is *not* exhaustive or inclusive, and does not exclude the use of TDRs for other purposes, including the protection of historic properties. As set forth in the legislative history of the Section:

This legislation program would allow any county or city governing body to establish a program in which the transfer of development rights may be utilized as an option to ***protect significant land resources*** while compensating the property owner. A Transfer of Development Rights Program involved the transfer of future development away from a resource protection area to an area appropriate for development. The governing body determines the amounts and conditions of such TDRs ***to fulfill the goals of the county or city pertaining to preservation and conservation of significant resources***.

Affidavit of Kathleen Rivers, Exhibit 1, p. 4, Statement of Purpose (emphasis added).

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The intent to provide municipalities the ability to protect significant land resources through the TDR program is evidenced through the legislative history. *See, e.g.*, 3/1/99 Minutes of the Revenue and Taxation Committee, Representative Jacquet, a sponsor of the bill, explained that TDRs "*may be utilized as an option to protect significant land resources*" (Rivers Aff., Exhibit 1, p. 7 (emphasis added)); 3/15/99 Minutes of the Revenue and Taxation Committee: "The governing body determines the amounts and conditions of such TDRs *to fulfill the goals of the county or city pertaining to the preservation and conservation of significant resources*" (Rivers Aff., Exhibit 1, p. 13 (emphasis added)).

In short, Idaho Code § 6515A does empower cities to undertake a critical review of its significant land resources, designate heritage properties as such resources, and undertake a TDR program to provide for their preservation. In addition, the preservation of historic and park properties protects "open spaces" as specifically allowed by Section 6515A. The TDR Ordinance at issue designates *inter alia* historic/heritage properties and public parks or open-spaces within the City. *See* Ordinance, Section 5. The TDR Ordinance recites the City's intention to encourage the preservation of "traditional scale" architecture (Section 1(I)(1)) and protect "vistas and open spaces" (p. 1 (citing Comprehensive Plan, Chapter 4.5)).

By seeking to preserve those heritage sites that are overwhelmingly 1-2 stories high,² and allowing the sale of their development rights, the City ensures that those open spaces and view corridors above those buildings are preserved. In addition, the City has designated open-space parks such as the Memory Park in Ketchum as sending sites. In this case 260 First has been actively engaged in negotiations to purchase TDRs from the Memory Park site. *See* Affidavits of Brian Barsotti and Scott Roberts.

² *See* TDR Ordinance, *Legal Description of Sending Sites*. *See also* TDR Ordinance, Section 5(c) describing heritage sites as 1-2 story style.

260 First is utilizing the TDR program to provide a development in downtown Ketchum with commercial retail spaces and affordable housing residential units. These are goals that the City properly recognized as civic priorities in enacting its new development ordinances. *See* Affidavits of Scott Roberts and Elizabeth Robrahn. While KGF complains of diminished penthouse views (and reduced sale prices), KGF cannot properly complain that the TDR Ordinance violates LLUPA.

III. The City Has Authority Under the *Historic Preservation Act* to Enact the TDR Ordinance

Idaho Code § 67-4619 also permits the City to use the TDR Ordinance to protect historic properties. This section provides:

Any county or city governing body may establish procedures authorizing owners of designated historic properties to transfer development rights in such amounts and subject to such conditions as the governing body shall determine. For the purposes of this section, "development rights" are the rights granted under applicable local law respecting the permissible bulk and size of improvements erected thereon.

The section speaks in broad terms of those historic properties as designated by a city, and does not set forth any designation criteria or requirements. Notably, "designated historic properties" is not a defined term in the Chapter, and Idaho Code § 67-4619 specifically does not import or recite those designation requirements that appear in other portions of the Act.

Significantly, designation as an historic property in other portions of the Act carries significant burdens, for example, no remodel of a designated historic property can take place until a six (6) month waiting period has passed (§ 67-4616). Accordingly, given these burdens it is understandable that a series of steps must be taken prior to any historic designation, including meeting the criteria established for inclusion of the property in the national register of historic places (§ 67-4614). However here, with the City Ordinance, designation as a heritage property "sending site" carries no such burdens of a six-month waiting period pending remodel or

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demolition, etc. The Ordinance is a completely voluntary program. Parties need not participate in the program; heritage sites are not required to sell their TDR rights – they may maximize the development potential irrespective of TDRs.

It is noteworthy that the City did undertake many, if not all, of those steps enumerated in the Preservation of Historic Sites Act prior to designating historic properties. For example, the City reviewed the historical, architectural, educational, and cultural significance of the sites (*see* Elizabeth Robrahn Affidavit, ¶ 12; Idaho Code § 67-4614); those sites were reviewed with the Ketchum Historic Preservation Commission (*see* Robrahn Aff., ¶ 12; Idaho Code § 67-4614); and owners of proposed historic sites received advance written notice (*see* Robrahn Aff., ¶ 13; Idaho Code § 67-4614).

When a court engages in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). The Court is to avoid absurd or unconstitutional construction of a statute. *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003), *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999). The purpose of the *Preservation of Historic Sites Act* is set forth in Idaho Code § 67-4601:

[T]he legislature of this state has determined that the historical, archeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and furthermore that the rapid social and economic development of contemporary society threatens to destroy the remaining vestiges of this heritage, it is hereby declared to be the public policy and in the public interest of this state to engage in a comprehensive program of historic preservation, undertaken at all levels of the government of this state and its political subdivisions, to promote the use and conservation of such property for the education, inspiration, pleasure and enrichment of the citizens of this state. It is hereby declared to be the purpose of this act to authorize the local governing bodies of this state to engage in a comprehensive program of historic preservation.

According to KGFs interpretation no municipality could undertake a program to protect


properties of historical, archeological, architectural or cultural significance via TDRs unless those properties were also burdened with development restrictions. This result would discourage the preservation of historic properties, and negate the purpose and intention of the Act.

Conclusion

For the foregoing reasons 260 First respectfully requests that the Court deny KGF's Motion for Summary Judgment in its entirety.

DATED: December 30, 2008

LAWSON & LASKI, PLLC



Michael D. Pogue
Attorneys for Intervenor 260 First LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2008, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy

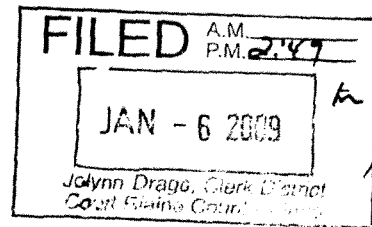
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Defendants.

) **Case No. CV-08-837**
)
) **REPLY BRIEF ON MOTION FOR**
) **SUMMARY JUDGMENT**

COME NOW the Plaintiff, KGF Development, LLC, (“KGF”), by and through its attorney, Fritz X. Haemmerle, of Haemmerle & Haemmerle, P.L.L.C., and hereby files this Reply Brief on Motion for Summary Judgment.

I. INTRODUCTION

Preliminarily, to the extent not mentioned in this Reply Brief, KGF reasserts each and every argument set forth in its opening brief as is fully set forth and relies on such arguments in this Reply Brief. In addition, KGF submits the following additional reply to the Response briefs submitted by 260 First and the City of Ketchum.

REPLY BRIEF ON MOTION FOR SUMMARY JUDGMENT - 1

II. IMPORTANT UNDISPUTED FACTS

When Copper Ridge was built, the highest a building could have been built on the Copper Ridge property without a waiver of the requirements of the Ketchum Municipal Code ("KMC") was 38 feet, a three-story building. (*Id.*; *Affidavit of Barry Lubovski*, ¶4.) At the time, there were no buildings in Ketchum that were higher than 38 feet and the City had never permitted a building over 38 feet. (*Id.*, ¶5.) While the City now suggests that a person could have built such a building under a waiver of the code provisions, there never had been such a project. Instead, there had always been great resistance by the public to increasing the height limit in Ketchum in order to preserve its small town feel. (*Id.*, ¶5).

In 2006, the "Downtown Ketchum Master Plan" recommended that the Historic Preservation Commission be engaged to advise the City of Ketchum on preserving historic buildings through the use of transfer of development rights and that the city planner take the lead on that effort. (*Robrahn Depo.*, p. 17, l. 21 – p. 20, l. 4; *see also* *Cady Depo.*, Exhibit 3, *Affidavit of Beth Robrahn*, Exhibit C, p. 57.)

The purpose for drafting the TDR Ordinance was for the preservation of historic properties in the City of Ketchum. (*Affidavit of Beth Robrahn*, ¶ 8-12, *Robrahn Depo.*, Tr. p. 33, l. 6-21; p. 29, l. 25 - p. 30, l. 9.) The TDR Ordinance was not drafted to protect open space, wildlife or critical areas. (*Affidavit of Beth Robrahn*, ¶ 8-12, Tr. p. 33, l. 6 – p. 37, l. 15.)

The TDR Ordinance designates 22 Sending Sites that can be preserved by allowing the property owner to sever the development rights from that property and

transfer them to any of 102 Receiving Sites. (*Affidavit of Beth Robrahn*, ¶14-18, and ¶25, Exhibit L; *Robrahn Depo.*, Tr. p. 41, l. 13-15; p. 51, l. 6-9.)

Only four (4) of the twenty-two (22) designated Sending Sites are listed or meet the criteria for listing on the National Register of Historic Places. (*Robrahn Depo.*, Tr. p. 39, l. 17-19; p. 43, l. 44 – p. 44, l. 22). No other Sending Sites meet the criteria. (*Id.*)

The owner of a Sending Site can sell more than double the development rights the owner would otherwise be entitled to develop. (*Affidavit of Beth Robrahn*, Exhibit L).

The Sending and Receiving sites are scattered throughout the community core district. (*Affidavit of Fritz X. Haemmerle*, Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions, Response to Request for Admission No. 1; *see also*, Ordinance 1034, Figure 1). There is no restriction on the sale of development rights to a Receiving Site located next door, so that a four-story building may be located right next to a historic property. (*Id.*; *see also Robrahn Depo.*, Tr. p. 36, l. 25 – p. 37, l. 15; p. 40, l. 8 – 22).

Vacant lots are not eligible to be preserved as they cannot qualify as Sending Sites. (*Robrahn Depo.*, Tr. p. 35, l. 2-7).

III. REPLY ARGUMENT

A. KETCHUM DOES NOT HAVE IMPLIED AUTHORITY UNDER ITS GENERAL POLICE POWERS TO ADOPT A TDR ORDINANCE.

The City's main argument (in which 260 First joins) is that under its police powers, the City could have adopted the TDR Ordinance in spite of the LLUPA (I.C. § 67-6515A) or in spite of the Historic Preservation Act (I.C. § 67-4601 et seq); or alternatively, Ordinance 1034 is not precluded by existing statutes. In essence, the City's

argument is that it could enact any TDR Ordinance it so desired under its police powers. This argument is meritless.

The power of municipalities to zone is derived from the State's police power. *City of Lewiston v. Knieriem*, 107 Idaho 80, 685 P.2d 821 (1984); Art XII, §3, Idaho Const. As it relates to enacting zoning laws, the Idaho Supreme Court has held that the LLUPA has preempted the independent source of authority when it comes to zoning, and the express provisions in the Historic Preservation Act negate separate authority in cities beyond the confines of the Act. While the City focuses on preemption to the exclusion of any discussion about statutory construction, the disposition of this case really comes down to well-established case law and statutory construction.

The Idaho Supreme Court has held that the LLUPA "establishes explicit and express procedures to be followed by the governing boards or commissions when considering, enacting and amending zoning plans and ordinances." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214,1216 (1983), *overruled on other grounds*, *Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 141 P.3d 1123 (2006). "The LLUPA provides both mandatory (I.C. § 67-6503) and exclusive (*Gumprecht v. City of Coeur d' Alene*, 104 Idaho 615, 661 P.2d 1214 (1983)) procedures for the implementation of planning and zoning." *Sprenger, Grubb & Assoc., Inc. v. Hailey*, 133 Idaho 320, 321, 986 P.2d 343, (1999); *see also*, *Associated Taxpayers of Idaho v. Cenarrusa*, 111 Idaho 502, 725 P.2d 526 (1986).

The fact that the City could *not* have enacted Ordinance 1034 under its own independent authority is proven by the fact that the legislature took the affirmative action of adopting Sections 67-6515A and 67-4619 to expressly authorize TDR ordinances.

"Courts must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Ind. Hwy*, 126 Idaho 145, 150, 879 P.2d 1078, 1082 (1994). This Court must assume that the Legislature knew of existing precedent at the time it passed or amended a statute. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Therefore, this Court is bound to construe the LLUPA and the Historic Preservation Act, and more specifically I.C. 67-6515A and I.C. 67-4619, under the assumption that the Legislature believed its actions were necessary to empower cities to enact TDR statutes.

Moreover, if in fact the City could have enacted any TDR Ordinance it desired, one must query why our own Representative Jaquet, who presumably acts at the behest or in the best interests of her constituents, went to the trouble to get Section 67-6515A enacted. (*Affidavit of Kathleen E. Rivers*, Exhibit 1).

The City has cited four cases to support its argument that the City has independent police power authority to enact the TDR Ordinance: *Gumprecht v. City of Coeur d'Alene*, *supra*; *Envirosafe Serv. of Idaho v. Cty. of Owyhee*, 112 Idaho 687, 735 P.2d 998 (1987); *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980); and *Benewah Cty. Cattlemen's v. Bd. of Cty. Com'rs.*, 105 Idaho 209, 668 P.2d 85 (1983).

Yet, these cases offer no support. Neither *Envirosafe*, *Caesar*, or *Benewah Cty.* deal with the LLUPA or zoning. The cases were about whether particular non-zoning ordinances adopted under claimed police powers were preempted by other state statutes. *Benewah* involved an ordinance preventing livestock from running at large. *Caesar* involved a building code ordinance requiring the installation of handrails in stairwells. *Envirosafe* involved an ordinance regulating hazardous waste and establishing a user fee.

In contrast, *Gumprecht* and its progeny hold that the LLUPA is the mandatory and exclusive means for enacting planning and zoning laws.

B. KETCHUM DOES NOT HAVE AUTHORITY UNDER THE LLUPA OR HISTORIC PRESERVATION ACT TO ENACT TDR LAWS AS REFLECTED IN ORDINANCE 1034.

Alternatively, the City and 260 First argue that if the City does not have independent authority to enact the TDR Ordinance, the TDR Ordinance fits within the broad powers granted under the LLUPA, even though it does not fit within the specific language of Section 67-6515A or provisions of the of the Historic Preservation Act (Section 67-4601 *et. seq.*). The City argues that “the TDR Ordinance attempts to create opportunities for land owners in an area of regulation addressed only in part by the state” and that these statutes only partially regulate TDRs, and therefore, the City can adopt its own version of a TDR Ordinance. In making this argument, the City ignores not only case law, but all of the rules of statutory construction that stand in its path to the conclusion that Ordinance 1034 falls within the authority granted in the LLUPA and the Historic Preservation Act.

First, as argued above, the LLUPA and the Historic Preservation Act provide mandatory and exclusive procedures for the implementation of TDR Ordinances. *Sprenger, Grubb & Assoc., Inc. v. Hailey*, 133 Idaho 320, 321, 986 P.2d 343 (1999). The City is not permitted to enact its own version of a TDR Ordinance outside the language of the LLUPA (Section 67-6515A) or in violation of the Historic Preservation Act (Section 67-4601 *et. seq.*).

Second, as already stated, “courts must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time

the statute was passed.” *City of Sandpoint v. Sandpoint Ind. Hwy*, 126 Idaho 145, 150, 879 P.2d 1078, 1082 (1994). The fact that the Legislature empowered cities to adopt TDR Ordinances under Sections 67-6515A and 67-4619 confirms that the Legislature believed legislation was necessary because cities did not have the authority to enact TDR statutes under their own independent authority or the general authority of the LLUPA or the Historic Preservation Act.

Third, “it is incumbent upon the court to give [a] statute an interpretation that will not deprive it of its potency.” *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292 (1994); *Hecla Mining Co. v. Idaho State Tax Commission*, 108 Idaho 147, 151, 697 P.2d 1161, 1165 (1985). If, in fact, the City could adopt the TDR Ordinance under the alleged “broad” powers granted under the LLUPA or the Historic Preservation Act, then there would have been no need whatsoever for the adoption of Sections 67-6515A or 67-4619. The City’s argument renders both of these statutes superfluous.

Fourth, “when there are specific statutes addressing an issue, those statutes control over more general statutes.” *City of Sandpoint v. Sandpoint Ind. Hwy*, 126 Idaho 145, 149, 879 P.2d 1078 (1994). “A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general.” *Tuttle v. Wayment Farms, Inc.*, 131 Idaho 105, 952, P.2d 1241 (1998); *Paterson v. State*, 128 Idaho 494, 915 P.2d 724 (1996); *City of Sandpoint v. Sandpoint Independent Highway Dist.*, *supra*; *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, (1993); *Hansen v. State*, 138 Idaho 865, 868, 71 P.3d 464 (Ct.App. 2003). The more general statute should not be interpreted as encompassing an area already covered by one

which is more specific. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Under the LLUPA, Section 67-6511 is the general statute empowering cities to adopt to zoning ordinances. That section provides:

Each governing board shall, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan.

Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district.

Under this general statute, cities have the authority to establish standards regulating height of buildings, density, floor area ratios, and number of stories, subject to the requirement that such standards are uniform throughout a district.

Section 67-6515A is the more specific statute in the LLUPA addressing the transfer of development rights. In enacting Section 67-6515A, the Legislature is presumed to have been aware of the general authority granted in Section 67-6511. Accordingly, Section 67-6515A, being more specific to TDR ordinances, is the controlling statute.

As already argued in KGF's Opening Brief, Ordinance 1034 was not adopted in conformance with Section 67-6515A as the ordinance does not protect open space, wildlife habitat and critical areas, or enhance and maintain the rural character of lands

with contiguity to agricultural lands suitable for long-range farming and ranching operations. Also, the City admitted, and the record is replete with references to the fact that the TDR Ordinance was enacted to protect historic properties and not open space, wildlife habitat and critical areas, or for enhancing and maintaining the rural character of lands contiguous to agricultural lands. (*Affidavit of Beth Robrahn*, ¶ 8-12, Robrahn Depo., Tr. p. 33, l. 6 - p. 37, l. 15.)

As for 260 First's specious argument that Ordinance 1034 was for the purpose of protecting open space, as already pointed out in KGF's Opening Brief, by prohibiting vacant lots from selling development rights, by permitting a four-story building to be right next to a heritage site, and by allowing the sale of more than double the development rights that would otherwise be permitted on a sending site, Ordinance 1034 actually reduces open space in the City. Likewise, 260 First's novel claim for the first time that the Sending Sites qualify as "critical areas" deserves short shrift as well considering the critical areas and wildlife are joined together in the same clause and therefore, must be interpreted in *pari materia*.

As for the Historic Preservation Act, Section 67-4601 provides as follows:

Whereas the legislature of this state has determined that the historical, archeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and furthermore that the rapid social and economic development of contemporary society threatens to destroy the remaining vestiges of this heritage, it is hereby declared to be the public policy and in the public interest of this state to engage in a comprehensive program of historic preservation, undertaken at all levels of the government of this state and its political subdivisions, to promote the use and conservation of such property for the education, inspiration, pleasure and enrichment of the citizens of this state. It is hereby declared to be the purpose of this act to authorize the local governing bodies of this state to engage in a comprehensive program of historic preservation.

This statute is the general statute authorizing cities to enact ordinances to protect historic properties. Section 46-4619 is the specific statute authorizing the use of TDRs for “designated historic properties.” As already argued in KGF’s Opening Brief, “designated historic properties” are those that meet the criteria for listing on the National Register of Historic Places. In this case, only four of the 22 sites in Ordinance 1034 meet those criteria.

In short, the specific provisions of Section 67-6515A control over the more general grant of authority in Section 67-6511, and the specific provisions of Section 67-4619 control over the more general grant of Section 67-4601. Ordinance 1034 does not comply with either of these statutes.

Fifth, in conjunction with the above rules of statutory construction, it is also a well-settled rule that “*maxim expression unis est exclusion alterius*” or the “expression of one thing in a statute excludes others not expressed.” *Cox v. Mountain Vista, Inc.*, 102 Idaho 714, 772, 639 P.2d 12 (1981); *Wright v. Brady*, 126 Idaho 671, 674, 889 P.2d 105, 108 (Ct.App. 1995). Where a statute specifies certain things, designation of the specific excludes other things not mentioned. *Local 1494, ETC. v. City of Coeur d’Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1358 (1978); *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18 (1987).

Here, the only statutes in the LLUPA and the Historic Preservation Act dealing with transfer of development rights are Sections 67-6515A and 67-4619. These statutes set forth express authority and parameters for the enactment of TDR ordinances. Had the Legislature intended cities to have all-inclusive TDR authority, it could easily have enacted statutes that said so. The Legislature could have enacted a TDR statute in the

LLUPA that very simply said “cities are authorized to adopt ordinances for the transfer of development rights.” Similarly, the Legislature could also have easily authorized in Section 67-4619 cities to adopt ordinances for the transfer of development rights for “historic properties” with no reference to “designated historic properties.” In fact, other sections of the Act do make reference to only “historic properties” rather than “designated” ones. In contrast to broad language the Legislature could have used with respect to TDRs, Sections 67-6515A and 67-4619 specifically authorize TDRs for limited reasons, none of which apply here.

The City has admitted that the Sending Sites are neither agricultural in nature nor eligible for the national historic registry. The City has also admitted that only four of the 22 designated Sending Sites meet the criteria for listing on the National Register of Historic Places. Since the TDR Ordinance transfers development rights for purposes outside of those identified in Sections 67-6515A and 67-4619, the TDR Ordinance is null and void.

Ignoring the “*maxim expression unis est exclusion alterius*” rule of statutory construction, the City and 260 First also argue that the preservation of “open space, protecting wildlife habitat and critical areas, and enhancing and maintaining the rural character of lands with contiguity to agricultural lands” is not an exhaustive list of permissible goals, and that protecting historic properties falls within Section 67-6515A. Yet, the express language of Section 67-6515A permits cities and counties to adopt TDR ordinances to “fulfill the goals of the city or county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands

with contiguity to agricultural lands suitable for long-range farming and ranching operations.” I.C. § 67-6515A(1)(a).

The preservation of “historic properties” is not identified as a permissible goal under Section 67-6515A and, therefore, according to rules of statutory construction, must be interpreted as being intentionally excluded. Indeed, it makes sense that the Legislature would not have included the preservation of historic properties as one of its purposes given the existence of the Historic Preservation Act.

Likewise, the specific reference to “designated historic properties” in Section. 67-4619 and the existence of Section. 67-4614, entitled “Designation as Historic Property,” must be interpreted as intentionally excluding undesignated “historic properties.” Indeed, this makes sense because the benefits of TDRs would only be available based on the clear, objective, and easily applied criteria of qualification for the National Register of Historic Places.

C. ORDINANCE 1034 VIOLATES THE UNIFORMITY REQUIREMENTS OF THE LLUPA.

Finally, if the City and 260 First’s argument that the City can enact a TDR Ordinance different than that contemplated by Sections 67-6515A and 67-4619 is accepted, then such zoning ordinance must at least meet the requirement of uniformity found in Section 67-6511. That statute requires:

Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. **All standards shall be uniform for each class or kind of buildings throughout each district**, but the standards in one (1) district may differ from those in another district.

(Emphasis added).

The Idaho Supreme Court had occasion to consider the uniformity requirement in *Moerder v. City of Moscow*, 78 Idaho 246, 300 P.2d 808 (1956). In that case, the ordinance at issue established a setback line that could vary from one block to the next on the same street. The building line could be farther back on one side of the street than on the other.

In reaching its decision that the ordinance violated the uniformity requirement because it did "not establish a uniform regulation for each class of buildings within the district", the Court stated:

The application and consequence of this ordinance is a gross discrimination, in that it does not bear alike on all persons living within the same territory. * * * it affects property differently on adjoining blocks, or within the same block or on opposite sides of the street. As Judge Linn of the Superior Court states: `* * * Consideration of the section will disclose that the line may be further back from the street line on one side of the street than on the other, and even on the same side of the street its distance from the street line may vary in different squares, its location depending wholly on how far back (if at all) a house or houses had already been built, and if but one house had been built, its line would seem to control all the other lot owners.

Moerder v. City of Moscow, supra at 250.

In discussing the challenged ordinance in particular, the Court stated:

Under the ordinance, setback lines could vary from one block to the next on the same street. The building line could be farther back on one side of the street than on the other, as in fact it was in the present case. The line could even vary from year to year in the same block as additional houses were constructed, if the ordinance were upheld.

Id.

Likewise, Ordinance 1034 does not apply uniformly throughout the district. Receiving and Sending sites are scattered throughout the community core district. Those

properties that have been designated Receiving Sites may reach heights of 50 feet while buildings on properties not so designated are limited to heights of 40 feet, and on Sending properties where development rights have been sold, heights may be limited to one story. At the same time, there are many lots in the district that are not designated Sending or Receiving sites, so that only certain property owners have the opportunity to participate in the TDR program.

Also, since there are many more Receiving Sites than Sending Sites, not even all of the designated Receiving Sites can obtain excess development rights. As such, Ordinance 1034 essentially applies on a first-come, first-serve basis to whomever has the means or wherewithal to develop first. In line with this, the control of the right to go to four stories on Receiving Sites is left entirely to the intentions or whims of who the particular owner of a Sending Site wishes to sell to. Finally, there is no limitation in Ordinance 1034 as to how many sites may ultimately be permitted as Sending or Receiving sites even if a property owner were to request to be so designated, setting the stage for random application of the ordinance. These deficiencies result in a situation where four story-buildings and three and fewer story buildings will be permitted in the downtown in a completely un-uniform manner.

There is no question that under Ordinance 1034, building heights will vary from one block to the next on the same street. Ordinance 1034 does not bear alike on all persons living within the same district and affects property differently on adjoining blocks, or within the same block or on opposite sides of the street. As such, assuming arguendo that the City could enact Ordinance 1034 outside of the parameters of Sections

67-6515A and 67-4619, Ordinance 1034 violates the uniformity requirement of Section 67-6511.

IV. CONCLUSION

There is no dispute about the facts. All that exists are questions of law for this Court to determine.

There are two specific statutes that authorize cities to adopt ordinances for the transfer of development rights. Those are Sections 67-6515A of the LLUPA, and Section 67-4619 of the Historic Preservation Act.

Section 67-6515A authorizes cities to adopt TDR ordinances to fulfill the goals of the city to "preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations." I.C. § 67-6515A(1)(a). The legislative history for Section 67-6515A makes it clear that "the objectives of a TDR program are to preserve agricultural land and maintain Idaho's historic rural farming and ranching landscapes, habitat and open space." (*Affidavit of Kathleen Rivers*; *See e.g.* Addendum, at p. 16, Minutes, Local Government and Taxation Committee, March 15, 1999; *see also* Addendum at p. 20, Letter from Idaho Association of Counties Legislative Chairman, dated March 15, 1999; *see also* Addendum, at p. 22, Letter from Idaho Association of Counties Executive Director, dated March 15, 1999; *see also* Addendum, p. 17, Jaquet, Idaho Statesman, 3/7/93).

There is no dispute that the Ordinance 1034 was not enacted to protect or preserve agricultural land, wildlife, habitat, or open space. It was enacted to preserve historic

buildings. The protection of historic properties is not within the permissible goals to support the enactment of a TDR Ordinance pursuant to this section.

The Historic Preservation Act also authorizes cities to adopt TDR ordinances. Section 67-4619, entitled "Transfer of Development Rights", specifically authorizes cities to "establish procedures authorizing owners of **designated historic properties** to transfer development rights in such amounts and subject to such conditions as the governing body shall determine." I.C. § 67-4619. (Emphasis added). Section 67-4614, entitled "Designation as Historic Property," specifically authorizes cities to "adopt an ordinance designating one or more historic properties" but also mandates that "[i]n order for any historic property to be designated in the ordinance, it must in addition meet the criteria established for inclusion of the property in the national register of historic places." I.C. § 67-4614.

There is no dispute that only four of the 22 designated Sending Sites in Ordinance 1034 meet the criteria for listing on the National Register of Historic Places.

Given the LLUPA and the Historic Preservation Act, and these specific statutes, the City does not have any other independent authority to adopt Ordinance 1034, and even if it did have some independent authority, the application of Ordinance 1034 is not uniform. Since Ordinance 1034 allows for the transfer of development rights in violation of the specific parameters permitted by the Legislature in Sections 67-6515A, 67-4601 and 67-6511, it is void.

DATED this 6th day of January, 2009.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: 

Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2009, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
MOORE SMITH BUXTON & TURKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702

Ed Lawson
Michael Pogue
LAWSON & LASKI, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

✓

By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

✓

By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

Fritz X. Haemmerle

side of the depositions were copied. Evidently, this Office failed to press the correct "two sided" copy button on the printer. To complete the Plaintiff's submittal, attached hereto as Exhibit 1, is the complete deposition of Sandy Cady. Attached hereto as Exhibit 2 is the complete deposition of Beth Robrahn.

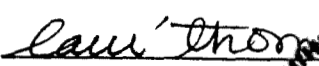
3. I do not believe that the parties are prejudiced because they have copies of the Depositions, and the cites relied upon by the Plaintiff were included in the Briefs.

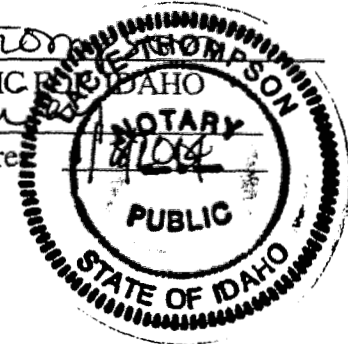
FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 12 day of January, 2008.


FRITZ X. HAEMMERLE

SUBSCRIBED AND SWORN to before me this 12th day of January, 2008.


NOTARY PUBLIC FOR IDAHO
Residing at: Hawthorne
Commission expire 1/1/09



CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of January, 2008, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
MOORE SMITH BUXTON & TURKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702

Ed Lawson
Michael Pogue
LAWSON & LASKI, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

_____ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

 ✓ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

_____ By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

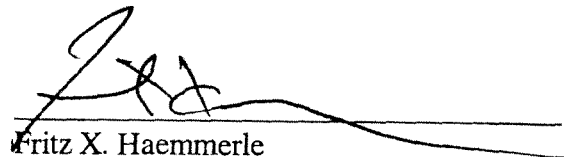

Fritz X. Haemmerle

EXHIBIT 1

Supplemental Affidavit of Fritz X. Hammerle-4

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAIN

KGF DEVELOPMENT, LLC,

Petitioner/Plaintiff,

vs.

CITY OF KETCHUM, a municipal

corporation of the State of

Idaho; 260 FIRST, LLC, an Idaho

Limited Liability Company,

Respondent/Defendant.

COPY

Case No. CV-08-233

**Exhibits bound
separately**

DEPOSITION OF SANDY CADY

OCTOBER 22, 2008

REPORTED BY:

DIANA KILPATRICK, CSR No. 727, RPR

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1 THE DEPOSITION OF SANDY CADY was taken
2 on behalf of the Petitioner/Plaintiff at the
3 office of Haemmerle & Haemmerle, 400 South Main
4 Street, Suite 102, Hailey, Idaho, commencing at
5 9:00 a.m. on October 22, 2008, before Diana
6 Kilpatrick, Certified Shorthand Reporter and
7 Notary Public within and for the State of Idaho,
8 in the above-entitled matter.

APPEARANCES:

9
10 For Petitioner/Plaintiff:

11 Haemmerle & Haemmerle

12 BY MS. KATHLEEN RIVERS

13 400 South Main Street, Suite 102

14 P.O. Box 1800

15 Hailey, Idaho 83333

16
17 For Respondent/Defendant City of Ketchum:

18 Moore Smith Buxton & Turcke

19 BY MS. SUSAN E. BUXTON

20 950 West Bannock, Suite 520

21 Boise, Idaho 83702

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I N D E X

TESTIMONY OF SANDY CADY	PAGE
Examination By Ms. Rivers	4
Examination By Ms. Buxton	11
Further Examination By Ms. Rivers	14

EXHIBITS MARKED AT CONCLUSION OF DEPOSITION

1. Complete certified copy of the administrative record prepared by the City of Ketchum in Blaine County Case CV 07250
2. Complete certified administrative record prepared by the City of Ketchum in Blaine County Case CV 08233.
3. Complete affidavit of Beth Robrahn and all attachments to it filed by the City of Ketchum in Blaine County Case CV 07250.

1 SANDY CADY,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:

4 EXAMINATION

5 QUESTIONS BY MS. RIVERS:

6 Q. Sandy, my name is Kathleen Rivers, and
7 I'm here representing KGF Development, LLC.
8 Would you just state your name and address for
9 the record?

10 A. Sandy Cady, 214 East Gulch Road,
11 Hailey, Idaho, 83333.

12 Q. And you work for the City of Ketchum.
13 Correct?

14 A. Correct.

15 Q. And are you the city clerk for the City
16 of Ketchum?

17 A. Yes.

18 Q. And as city clerk, are you the
19 custodian of the official records for the City of
20 Ketchum?

21 A. Yes.

22 Q. And as part of your regular duties for
23 the City of Ketchum are you responsible for
24 preparing the record of administrative appeals
25 for the city council's decisions?

Page 5

1 A. For preparing?

2 Q. For compiling the administrative
3 records for -- in appeals to city council
4 decisions.

5 A. I don't do their appeals. I'm sorry.

6 Q. Okay. You're here today in response to
7 a deposition duces tecum for you. Correct?

8 A. Um-hum.

9 Q. Okay. And as part of that deposition
10 duces tecum, you were requested to bring copies
11 of certain documents from the Ketchum City
12 records. Correct?

13 A. Correct.

14 Q. And were you responsible for gathering
15 and putting together the documents that you
16 brought today? Or who was, if you were not?

17 A. Ben Worst.

18 Q. But you are the custodian of the
19 records?

20 A. Correct.

21 Q. Okay. And the first item that was
22 requested was a complete certified copy of the
23 administrative record prepared by the City of
24 Ketchum in Blaine County Case CV 07250. Did you
25 bring that with you?

1 A. Yes, I did.

2 Q. Can you show me what that is, and if
3 we can get that marked as Exhibit 1.

4 A. Huge copies.

5 MS. RIVERS: This is going to be
6 Exhibit 1 for the record. However, this is the
7 City of Ketchum's official record, so what we're
8 going to do is have the City make a copy of that,
9 and that copy will be the one that's attached to
10 the deposition.

11 MS. BUXTON: That's correct. My
12 understanding, Ms. Rivers, was that the City of
13 Ketchum will prepare these, and we'll charge you
14 the rate that we charge for any copying. Is that
15 your understanding?

16 MS. RIVERS: That sounds fine. If for
17 some reason we choose to go a different method,
18 for example, we make the copies, that we can talk
19 about afterwards, but you're agreeable that this
20 will be marked as Exhibit 1.

21 MS. BUXTON: A copy of that. The
22 official document will be marked as Exhibit 1.
23 That is correct.

24 MS. RIVERS: Okay.

25 ///

Page 7

1 BY MS. RIVERS:

2 Q. May I called you Sandy, by the way?

3 A. Yes, you can.

4 Q. And let me -- this, I take it, this was
5 a true and complete copy -- or this is the
6 administrative record. This is the City of
7 Ketchum's only copy. Is that correct?

8 A. Yes. The original, yes.

9 Q. This is the original?

10 A. Um-hum.

11 Q. And that was filed in Blaine County
12 case CV 07250. Correct?

13 A. Correct.

14 Q. And are the documents in that Exhibit 1
15 kept in the regular course of business of the
16 City of Ketchum?

17 A. Yes.

18 Q. Okay. Now, the next item that you were
19 asked to bring was a complete certified
20 administrative record prepared by the City of
21 Ketchum in Blaine County Case CV 08233. Did you
22 bring that?

23 A. Yes.

24 MS. RIVERS: And this will be
25 Exhibit 2.

1 MS. BUXTON: That's correct.

2 MS. RIVERS: And again, the same
3 procedure will take place. I understand the City
4 of Ketchum, since this is the official record,
5 the City of Ketchum will make copies of it, will
6 charge KGF Development, LLC for a copy, which
7 will be attached to the deposition and will be
8 marked as Exhibit 2. Is that correct?

9 MS. BUXTON: That's correct.

10 BY MS. RIVERS:

11 Q. And is this Exhibit 2 a true -- or that
12 is the official record that was filed in Blaine
13 County Case CV 08233. Is that correct?

14 A. It was 07250. I'm sorry, yes. Yes,
15 I'm sorry.

16 Q. And that Exhibit 2 is from the official
17 files from the City of Ketchum?

18 A. Yes.

19 Q. And it was kept in the regular course
20 of business of the City of Ketchum?

21 A. Yes.

22 Q. And then the last item that you were
23 asked to bring was a complete affidavit of Beth
24 Robrahn and all attachments to it filed by the
25 City of Ketchum in Blaine County case CV 07250.

1 Did you bring that?

2 A. Yes, I did.

3 Q. And that will be -- I'll have that
4 marked as Exhibit 3, and the same stipulation
5 would apply that since you brought -- I take it
6 you brought the only copy in the City of
7 Ketchum's files?

8 A. Yes.

9 Q. And so that you will make a copy of
10 that, charge KGF Development.

11 MS. RIVERS: Are we going to have it
12 supplied directly to the court reporter?

13 MS. BUXTON: However you'd like to do
14 it, Kathy.

15 MS. RIVERS: Let's do it that way.
16 Because that way it doesn't get mixed up in
17 transit.

18 MS. BUXTON: I think that's a better
19 idea.

20 MS. RIVERS: A copy of that will be
21 provided to the court reporter and will be marked
22 as Exhibit 3 to this deposition. And counsel
23 agrees to that?

24 MS. BUXTON: I do.

25 ///

1 BY MS. RIVERS:

2 Q. As far as Exhibit 3, is that a true and
3 complete copy of the affidavit of Beth Robrahn
4 and all the attachments to it in Blaine County
5 Case CV 07250?

6 A. Yes.

7 Q. And it's a copy from the official files
8 of the City of Ketchum?

9 A. Yes.

10 Q. And is it kept in the regular course of
11 business of the City of Ketchum?

12 A. Yes.

13 Q. Thank you. I just have two more
14 questions. Let me just ask this. Are there any
15 other documents that you know of in the Ketchum
16 City files that relate to either CV 08233 or
17 CV 07250 that are not in these official records?

18 A. No.

19 Q. Okay. And then, let me just ask you a
20 couple questions here. To your knowledge, well,
21 let me back up. As the city clerk, do you have
22 the official files -- do your official files
23 include all of the ordinances adopted by the City
24 of Ketchum?

25 A. Yes.

1 Q. And to your knowledge, among those
2 ordinances, is there any ordinance other than the
3 ordinances that are referred to in case CV 07250
4 and CV 08233, is there any other ordinance
5 relating to the establishment of a historic
6 district in the City of Ketchum?

7 A. I don't believe so.

8 Q. And to your knowledge, is there any
9 other ordinance in your files in the City of
10 Ketchum other than the two -- the ordinances in
11 these two cases, CV 07250 and 08233, designated
12 historic properties in the City of Ketchum?

13 A. Say that again. I'm sorry.

14 Q. Is there any other ordinance, other
15 than the ones in these two cases we're talking
16 about, in the City of Ketchum files that
17 designates historic properties, to your
18 knowledge?

19 A. I don't know.

20 MS. RIVERS: That's all I have.

21 MS. BUXTON: Just a couple things.

22 EXAMINATION

23 QUESTIONS BY MS. BUXTON:

24 Q. Ms. Cady, you were earlier asked by
25 Ms. Rivers whether -- you agreed that you were

1 the custodian of the records for the City of
2 Ketchum. Correct?

3 A. Yes.

4 Q. And then you were asked whether you
5 prepared the documents for the two appeals that
6 we're talking about today. Is that correct?

7 A. Yes.

8 Q. And you said that Ben Worst --

9 A. Ben Worst.

10 Q. And who is Ben Worst?

11 A. I'm sorry. He was the city attorney
12 for the City of Ketchum.

13 Q. And -- but it is the duty of the city
14 clerk's office to supervise the preparation of
15 official documents for certified documents for
16 any purpose for the City. Is that correct?

17 A. Yes.

18 Q. And you supervised the legal
19 department's compilation of these documents. Is
20 that correct?

21 A. Yes.

22 Q. Thanks. One other question. You were
23 asked by Ms. Rivers a question of whether or not
24 you knew of any other ordinances other than those
25 mentioned in these two cases that we're talking

1 about today, which is CV 07250 and CV 08233, that
2 related to historic district designation, and you
3 said you do not believe so. Do you know for
4 sure, or have you looked for any additional
5 ordinances?

6 A. No, I have not.

7 Q. And if there are additional ordinances,
8 would the city clerk's office provide those to
9 Ms. Rivers?

10 A. Yes.

11 Q. Same -- similar question for an
12 ordinance designating historic properties. Did
13 you look through the records of the City for any
14 additional ordinances other than those two
15 designated in these two cases?

16 A. No.

17 Q. So you don't know if there's an
18 additional one?

19 A. I do not.

20 Q. If we find another one, will you
21 provide that to Ms. Rivers?

22 A. Yes, I will.

23 MS. BUXTON: I have no further
24 questions.

25 MS. RIVERS: I have no further

1 questions, but with the understanding -- let me
2 just ask one question.

3 FURTHER EXAMINATION

4 QUESTIONS BY MS. RIVERS:

5 Q. Do you index the ordinances when you
6 compile them in the records? Are they in
7 numerical order?

8 A. They're in numerical order.

9 Q. Okay.

10 A. Originals.

11 Q. But you have agreed to provide us with
12 any other ordinances relating to historic
13 properties if they are in your files?

14 A. Yes.

15 MS. RIVERS: Great. Thank you.

16 MS. BUXTON: I have no further
17 questions.

18 (Deposition Concluded at 9:10 a.m.)

19 (Signature Was Requested.)

20 * * * * *

21

22

23

24

25

1 REPORTER'S CERTIFICATE

2 I, DIANA KILPATRICK, CSR No. 727,
3 Certified Shorthand Reporter, certify;

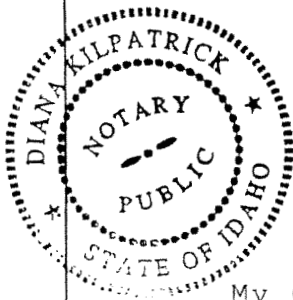
4 That the foregoing proceedings were taken
5 before me at the time and place therein set
6 forth, at which time the witness was put under
7 oath by me;

8 That the testimony and all objections made
9 were recorded stenographically by me and were
10 thereafter transcribed by me, or under my
11 direction;

12 That the foregoing is a true and correct
13 record of all testimony given, to the best of my
14 ability;

15 I further certify that I am not a relative
16 or employee of any attorney or party, nor am I
17 financially interested in the action.

18 IN WITNESS WHEREOF, I set my hand and seal
19 this 6th day of November, 2008.



Diana Kilpatrick

DIANA KILPATRICK, CSR, RPR

Notary Public

Hailey, Idaho 83333

My Commission expires January 13, 2011

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EXHIBIT 2

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner/Plaintiff,

vs.

CITY OF KETCHUM, a municipal

corporation of the State of

Idaho; 260 FIRST, LLC, an Idaho

Limited Liability Company,

Respondent/Defendant.

Case No. CV-08-233

COPY

DEPOSITION OF BETH ROBRAHN

SEPTEMBER 29th, 2008

REPORTED BY:

DIANA KILPATRICK, CSR No. 727, RPR

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,)
Petitioner/Plaintiff,)
vs.)
CITY OF KETCHUM, a municipal) Case No. CV-08-233
corporation of the State of)
Idaho; 260 FIRST, LLC, an Idaho)
Limited Liability Company,)
Respondent/Defendant.)

DEPOSITION OF BETH ROBRAHN
SEPTEMBER 29th, 2008

REPORTED BY:

DIANA KILPATRICK, CSR No. 727, RPR

Notary Public

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7 1. Affidavit of Beth Robrahn
8 2. Administrative Record for
9 Case No. CV-08-233
10 3. Not admitted
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Page 4

1 THE DEPOSITION OF BETH ROBRAHN was
2 taken on behalf of the Petitioner/Plaintiff at
3 the office of Haemmerle & Haemmerle, 400 South
4 Main Street, Suite 102, Hailey, Idaho, commencing
5 at 9:30 a.m. on September 29, 2008, before Diana
6 Kilpatrick, Certified Shorthand Reporter and
7 Notary Public within and for the State of Idaho,
8 in the above-entitled matter.
9 APPEARANCES:
10 For Petitioner/Plaintiff:
11 Haemmerle & Haemmerle
12 BY MS. KATHLEEN RIVERS
13 400 South Main Street, Suite 102
14 P.O. Box 1800
15 Hailey, Idaho 83333
16 For Respondent/Defendant 260 First:
17 Lawson and Laski
18 BY MR. MICHAEL D. POGUE
19 P.O. Box 3310
20 Ketchum, Idaho 83340
21 For Respondent/Defendant City of Ketchum:
22 Moore Smith Buxton & Turcke
23 BY MS. STEPHANIE J. BONNEY
24 950 West Bannock, Suite 520
25 Boise, Idaho 83702

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1 DEPOSITION OF BETH ROBRAHN
2 SEPTEMBER 29, 2008
3 MS. RIVERS: This is the time set for
4 the deposition of -- what's your full name?
5 THE WITNESS: Beth Robrahn.
6 MS. RIVERS: Beth Robrahn, in Case
7 No. CV-08-233, Blaine County, Idaho. Would you
8 swear the witness, please?
9 BETH ROBRAHN,
10 first duly sworn to tell the truth relating to
11 said cause, testified as follows:
12 EXAMINATION
13 QUESTIONS BY MS. RIVERS:
14 Q. May I call you Beth?
15 A. Yes. My full name is Elizabeth, but
16 yes, Beth.
17 Q. I may call you Beth, then?
18 A. Yes.
19 Q. My name is Kathleen Rivers. Have you
20 ever had your deposition taken before?
21 A. Yes.
22 Q. And so you know how this process works,
23 generally?
24 A. Generally.
25 Q. Okay. I'll be -- I represent -- I'm

1 one of the attorneys representing KGF
 2 Development, and I'll be asking you questions
 3 about your knowledge and involvement in the
 4 enactment of the Ketchum TDR ordinances. You'll
 5 have to answer them and you're under oath. The
 6 other lawyers may ask you questions after I ask
 7 you questions, if they so choose. Then a
 8 transcript is prepared and you're allowed to look
 9 it over, make any corrections before signing it.
 10 A. Okay.
 11 Q. Do you understand how that works?
 12 A. Yes.
 13 Q. And one of the things is you should
 14 wait until I finish asking my question to answer,
 15 because she takes it down in the order, and if
 16 we're cutting each other off it's hard for her to
 17 get everything down, the court reporter.
 18 A. Okay.
 19 Q. It's very important that you understand
 20 the questions that I ask and give accurate
 21 answers. If you don't understand then please
 22 just let me know.
 23 A. Okay.
 24 Q. Anything you don't know or aren't sure
 25 of, you'll let me know so that we can make sure

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1 that your answers are accurate and correct.
 2 Okay?
 3 A. Okay.
 4 MS. RIVERS: And Counsel, can we agree
 5 that all objections are preserved for trial
 6 except as to the form of the question?
 7 MS. BONNEY: Yes.
 8 MR. POGUE: Um-hum. Yes.
 9 MS. RIVERS: Thank you.
 10 BY MS. RIVERS:
 11 Q. Beth, can you just give me some
 12 background on your educational history? Where
 13 did you go to college, what did you study, that
 14 sort of thing.
 15 A. I received a Bachelor of Science in
 16 Natural Resource Management, Ohio State
 17 University, and I received a Masters in
 18 Planning --
 19 Q. Let me stop you right there. Ohio
 20 State University. What year was that?
 21 A. I graduated in 1995.
 22 Q. Okay. Then you went on to get a
 23 graduate degree?
 24 A. Yes.
 25 Q. And you say that was in Planning?

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1 A. Yes.
 2 Q. What is meant by a Planning degree?
 3 A. I wasn't prepared for these questions.
 4 It's typically City planning, so the work of
 5 implementing and writing City ordinances and,
 6 mainly the implementation of the City's
 7 ordinances related to development, growth,
 8 etcetera.
 9 Q. And where did you get that Masters?
 10 A. The University of British Columbia.
 11 Q. And when did you receive that?
 12 A. I graduated in -- I think it was 1999.
 13 Q. Was that a one-year course of study?
 14 A. Two years.
 15 Q. Two years, did you receive an MA or MS?
 16 A. MA.
 17 Q. And beyond that Masters, any other
 18 advanced degrees?
 19 A. No.
 20 Q. And any special training courses or
 21 certificates that you received beyond that?
 22 A. In transportation planning, transit
 23 management, I have a certificate in transit
 24 management. I think that's all.
 25 Q. Where did you receive that certificate?

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1 A. I don't remember.
 2 Q. Was it just a course you took through
 3 work or something?
 4 A. Yes.
 5 Q. And tell me again me your work history.
 6 After you received your Masters, where did you go
 7 to work? Or what was your first planning related
 8 job?
 9 A. For the City of Ketchum.
 10 Q. Again, when did you receive your
 11 Masters?
 12 A. In '99.
 13 Q. When did you go to work for the City of
 14 Ketchum?
 15 A. I actually started working for the City
 16 of Ketchum before I started my Masters program.
 17 I started my Masters program in '97, and I did
 18 some work, internship type of work for the City
 19 of Ketchum before that, and then during my
 20 Masters degree.
 21 Q. What type of internship work? Was it
 22 in the Planning Department?
 23 A. Um-hum.
 24 Q. What kind of, roughly -- what was your
 25 job description?

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1 A. Sort of administrative assistant while
2 they were doing their comprehensive plan process.
3 Then during my internship while I was in school I
4 did some actual staff reports, that type of
5 thing.

6 Q. So it would be safe to say that since
7 roughly 1997 -- is that what you said? You've
8 worked in the planning field?

9 A. Yes.

10 Q. After your Masters -- let me back up a
11 little bit. Instead of going directly to the
12 City of Ketchum work, did you work -- who else
13 did you work for in Blaine County?

14 A. In Blaine County? I've worked for Wood
15 River Ride Share, which was a nonprofit
16 organization.

17 Q. What did you do for them?

18 A. I was the executive director. The
19 founder and executive director.

20 Q. Okay. When did you do that?

21 A. I did that from about 1999 through --
22 officially probably 2000 through 2005, maybe.

23 Q. And tell me what you were involved in
24 when you were at that job.

25 A. I developed and managed transportation

1 programs in Blaine County.

2 Q. Okay. Then in 2005 is when you went to
3 work for the City of Ketchum?

4 A. Yes. I believe that was 2005.

5 Q. And what were you hired as?

6 A. A planner.

7 Q. And were you the head of the Planning
8 Department?

9 A. No.

10 Q. Who was your boss there?

11 A. Harold Moniz.

12 Q. And was he -- at some point did he
13 leave, or did you become the senior planner, or
14 did you stay in that same role throughout your
15 tenure at City of Ketchum?

16 A. No. I was promoted to senior planner,
17 still working under Harold.

18 Q. So when you first went in, you were
19 just considered what would be called a planner?

20 A. Yes.

21 Q. How much after you started work for
22 them did you become a senior planner?

23 A. It was either within the year -- within
24 my first year or soon after my first year.

25 Q. Okay. And what was -- how long did you

1 work there until?

2 A. Until August of that year, 2007.

3 Q. And what was your reason for leaving?

4 A. I got a job as the Hailey Planning
5 Director.

6 Q. And are you the head of that department
7 in Hailey?

8 A. Yes.

9 Q. Okay. Who do you report to at that
10 job?

11 A. The City Administrator.

12 Q. When you were working at the City of
13 Ketchum, did you have anyone working under you?
14 Were you in a supervisory capacity at all?

15 A. Not really.

16 Q. How many people were in the department?

17 A. When I started there was another
18 planner, and then the administrative person, and
19 then the director and myself.

20 Q. Beth, just a few questions,
21 housekeeping, almost. Have you ever had any
22 involvements or contacts with KGF Development,
23 the plaintiff in this case, or Kevin Fortin, or
24 its representatives related to this lawsuit?

25 A. Probably my main interaction was with

1 their attorney, Barry Luboviski.

2 Q. When would those interactions have
3 occurred?

4 A. While we were writing the TDR
5 ordinance.

6 Q. Did you meet with any lawyer regarding
7 this deposition?

8 A. No.

9 Q. Okay. Have you signed any written
10 statements, made any recorded statements, spoken
11 to anyone about the events related to this
12 lawsuit?

13 MR. POGUE: Object to the form. You
14 can answer.

15 MS. RIVERS: Would you like me to break
16 up --

17 MR. POGUE: No.

18 BY MS. RIVERS:

19 Q. I will break it up. Have you signed
20 any written statements to anyone about the events
21 related to this lawsuit?

22 A. Well, the affidavit.

23 Q. Was that the only one that you recall?

24 A. Yes.

25 Q. Have you made any recorded statements?

1 A. I don't think so.
 2 Q. Have you spoken to anyone about the
 3 events related to this lawsuit?
 4 A. Well, I spoke to Stephanie.
 5 Q. When did you speak with her? Did you
 6 meet with her in person or speak with her by
 7 phone?
 8 A. Over the phone.
 9 Q. When did that --
 10 A. Probably last week.
 11 Q. Was that about this deposition that was
 12 coming up?
 13 A. Yes.
 14 Q. Was anyone else on that phone
 15 conversation?
 16 A. No.
 17 Q. Or present when you were speaking?
 18 A. No.
 19 Q. Was anyone in your office at the time
 20 when you were on the phone with her?
 21 A. No. And I also talked to Lisa Horowitz
 22 before I talked to Stephanie.
 23 Q. Who is Lisa Horowitz?
 24 A. She is the Community Development
 25 Director for the City of Ketchum.

1 Q. What did you talk to her about? Let me
 2 back up. When did you talk to her?
 3 A. Like the day or the day after Fritz
 4 called me about the deposition.
 5 Q. And when you say Fritz, that was Fritz
 6 Haemmerle, who is the attorney representing KGF?
 7 A. Yes.
 8 Q. And he called you to inform you about
 9 this deposition?
 10 A. Yes.
 11 Q. And did you call Lisa or did she call
 12 you?
 13 A. I called Lisa.
 14 Q. And tell me, was that the only
 15 conversation you had with Lisa before this
 16 deposition?
 17 A. About this deposition?
 18 Q. Or before this.
 19 A. Yes.
 20 Q. Tell me what you spoke to her about.
 21 A. I told her I was being deposed, just to
 22 inform her, because I wasn't sure who in the City
 23 of Ketchum was involved with they this. Then she
 24 referred me to Stephanie.
 25 Q. Did you have any substantive

1 conversation with her about this?
 2 A. No.
 3 Q. The deposition or the case.
 4 A. No.
 5 Q. Okay. Anybody else? Did you have any
 6 conversations with anybody else about this
 7 deposition?
 8 A. I don't believe so.
 9 Q. Okay. And was it just one conversation
 10 that you had with Stephanie prior to this, about
 11 this deposition?
 12 A. Yes. Over the phone, one conversation.
 13 Then she sent me an e-mail with my affidavit
 14 attached to it.
 15 Q. And that was the affidavit that you had
 16 previously filed or signed in the prior case, a
 17 different case?
 18 A. I guess so. I don't know what case it
 19 was for.
 20 Q. Okay. But it was for the affidavit
 21 that you had signed earlier, at an earlier time?
 22 A. Yes. In April.
 23 Q. Can you tell me everything you did to
 24 get ready for this deposition?
 25 A. I skimmed my affidavit that I had

1 signed previously. That's all.
 2 Q. Okay. And did that include looking at
 3 the attachments to it as well?
 4 A. No. I did not look at the attachments.
 5 Q. Okay. I'm going to show you what's
 6 been marked Exhibit 1.
 7 MS. RIVERS: I've actually, just for
 8 counsel's information, I've sticky tabbed the
 9 spots I'm going to refer to so it's easier to
 10 find them. We can take them off.
 11 BY MS. RIVERS:
 12 Q. And just for the record, the affidavit
 13 that you signed was not in a notebook. Isn't
 14 that correct? It was just loose paper type form.
 15 A. I think so.
 16 Q. Do you recall?
 17 A. I don't really recall. I think it was
 18 just loose paper form.
 19 Q. Okay. And can you just quickly look --
 20 or take some time to look through it and tell me
 21 if that appears to be a complete copy of the
 22 affidavit that you signed previously?
 23 A. It looks like it.
 24 Q. Actually, can you just quickly look
 25 through those exhibits as well and see if that

1 represents the exhibits that you recall that were
 2 attached to the affidavit?
 3 A. Yes. Looks like.
 4 Q. Does that appear to be a true and
 5 accurate copy of the exhibit that you signed?
 6 A. It appears to be.
 7 Q. In Case CV 07-250?
 8 A. It appears to be.
 9 Q. And you signed that affidavit at whose
 10 request?
 11 A. The Ketchum City Attorney at the time,
 12 Ben Worst.
 13 Q. And I'm going to refer you to
 14 Attachment C to your affidavit. Actually, prior
 15 to that, when was that -- when did you sign that
 16 affidavit? If you can just look at that again.
 17 A. April 16th, 2008.
 18 Q. And that was signed, then, after you
 19 had left the City of Ketchum. Right?
 20 A. Yes.
 21 Q. I'm going to refer you to Attachment C,
 22 the Master Plan Framework, is the title of that
 23 attachment. Now, in your affidavit you state
 24 that this was prepared at the behest of the City
 25 of Ketchum, the Master Plan Framework. Tell me a

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1 little bit about that, how that came about.
 2 A. I'm not really sure how it came about.
 3 Just sort of evolved as something the City wanted
 4 to do to plan its downtown.
 5 Q. And what is the date on that? Were you
 6 a part of the request for that?
 7 A. I worked for the City at the time.
 8 A. Okay.
 9 Q. Okay. What was the date on that?
 10 A. January of 2006.
 11 Q. So you were in the Planning Department
 12 when that was prepared?
 13 A. Yes.
 14 Q. Would you go to page 56 and 57 of that
 15 Master Plan Framework, and just take a minute to
 16 look at those two pages.
 17 A. Did you say 56?
 18 Q. Fifty-six and fifty-seven.
 19 A. Okay.
 20 Q. Is it safe to say that these two pages
 21 describe the steps the City should take for
 22 revitalization?
 23 MR. POGUE: Object to the form of the
 24 question.
 25 MS. RIVERS: What's the objection?

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1 MR. POGUE: It's vague and ambiguous.
 2 BY MS. RIVERS:
 3 Q. Go ahead.
 4 A. Can you repeat the question?
 5 Q. Is it safe to say that the pages
 6 describe the steps the City should take for
 7 revitalization?
 8 A. Yes.
 9 Q. And in fact, it says that in the very
 10 first paragraph, doesn't it?
 11 A. Yes.
 12 Q. Can you tell me, going to the second
 13 page, 57, can you describe for me the second step
 14 there that's listed.
 15 A. "Engage the Historic Preservation
 16 Commission to advise the City on potential
 17 locations for heritage subdistricts for
 18 architectural heritage, especially cottage homes
 19 and historic buildings, could be preserved
 20 through such tools as transfer of development
 21 rights."
 22 Q. And who does it state should take the
 23 lead on that?
 24 A. City Planner.
 25 Q. And your affidavit states that you were

Page 20

1 the Ketchum Planner with primary responsibility
 2 for preparing the TDR ordinance as called for in
 3 the Master Plan Framework. Correct?
 4 A. Correct.
 5 Q. And can you go back and review the key
 6 projects and program's next steps, those two
 7 pages, and tell me if there's any other mention
 8 of a utilization of a TDR ordinance to achieve
 9 any of the steps and recommendations.
 10 A. Where do you want me to look?
 11 Q. The same two pages. Can you just go
 12 back and review if there's anywhere else in those
 13 recommendations where it suggests that use of a
 14 TDR ordinance to achieve those steps or
 15 recommendations.
 16 A. I don't think so.
 17 Q. That's the only mention of a TDR
 18 ordinance, is it not?
 19 A. Yes.
 20 Q. Okay. And to your knowledge, was any
 21 other -- anyone else in the City at the time
 22 working on a different TDR ordinance for other
 23 reasons?
 24 A. No. I don't think so.
 25 Q. Okay. And as lead person for

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1 developing a TDR ordinance, you reviewed the
 2 Archeological and Historic Survey Report, which
 3 is attached as Exhibit E to your affidavit. Is
 4 that correct?
 5 A. Yes.
 6 Q. And you reviewed that with the Ketchum
 7 Historic Preservation Commission?
 8 A. Yes.
 9 Q. What did that review entail?
 10 A. Basically I took all the properties
 11 that were listed in the survey report, so
 12 basically they were all the properties over
 13 50 years old in Ketchum, that were indowntown,
 14 and I took pictures of them, compiled all the
 15 information on the different properties that I
 16 could find in this survey report, and from the
 17 other, like the library, wherever I could find
 18 information, and compiled all of that information
 19 into a slide show for the Historic Preservation
 20 Commission to look at.
 21 Q. Okay. Let me ask you, one of the
 22 things that this Archeological and Historical
 23 Survey Report did was to evaluate properties in
 24 the City of Ketchum using the National Register
 25 of Historic Places criteria established for

1 eligibility. Correct?
 2 A. Correct.
 3 Q. In fact, if you look at page 4 of
 4 Exhibit E, it states that there, doesn't it?
 5 A. Yes.
 6 Q. And will you go to pages 38 through 41,
 7 please, of that report? Actually, beginning
 8 of 38. And that -- is it fair to say that those
 9 four pages discuss the properties in the
 10 community core district?
 11 A. That are eligible for the national
 12 register, yes.
 13 Q. The National Register of Historic
 14 Places?
 15 A. Yes.
 16 Q. And that discusses the sites in the
 17 community core district that either are listed or
 18 meet those criteria. Correct?
 19 A. Yes.
 20 Q. Now, the community core district is
 21 essentially the downtown district of Ketchum? Or
 22 what is that?
 23 A. Essentially.
 24 Q. Okay. And the TDR ordinance, does it
 25 apply to properties outside the community core at

1 all, or is it all in the community core?
 2 A. They were all in the community core.
 3 Q. And when I say the TDR ordinance, I'm
 4 talking at this point about Ordinance 1005 that
 5 you were working on. Is that correct?
 6 A. Correct.
 7 Q. And can you also go to Attachment 4 of
 8 Exhibit E? What's the title of that attachment?
 9 A. Historic Sites Potentially Eligible or
 10 Listed to the National Register of Historic
 11 Places.
 12 Q. And that attachment lists all of the
 13 sites throughout the City. Correct?
 14 A. Correct. That are potentially eligible
 15 or listed.
 16 Q. Okay. Now, Beth, I'm going to show you
 17 what's been marked Exhibit No. 2 in this case,
 18 and I'll represent to you that it's the record,
 19 the administrative record in case -- this case,
 20 08-233, Blaine County civil case. And --
 21 actually, I'm going to back up. I'm not going to
 22 use that exhibit at this moment.
 23 A. Okay.
 24 Q. No, I am. I'm sorry. Getting mixed up
 25 here. I want you to just -- I'm going to refer

1 to the first few tabs in this.
 2 MS. RIVERS: And Counsel, I don't have
 3 yours tabbed.
 4 MR. POGUE: That's okay.
 5 BY MS. RIVERS:
 6 Q. I'm going to have you go to the first
 7 tab and just basically tell me what that is, if
 8 you recognize that.
 9 A. It's an agenda for the Historic
 10 Preservation Commission meeting of April 12,
 11 2006.
 12 Q. And were you at that meeting?
 13 A. I hope so.
 14 Q. Were you the one who conducted those
 15 meetings for the City of Ketchum?
 16 A. Yes.
 17 Q. Okay. And tell me what the topic of --
 18 the general topic of that meeting was.
 19 A. Well, the agenda says, "Discussion of
 20 transfer of development rights for historic
 21 preservation."
 22 Q. Okay. And the second page of this tab
 23 is a sheet with handwritten notations on it. Is
 24 that your handwriting?
 25 A. No.

1 Q. Do you know whose handwriting that is,
2 by any chance?
3 A. I'm not sure.
4 Q. Okay. Let's just go to the next tab,
5 then. Why don't we go to the next tab, and tell
6 me what that is, and if you recall being at that
7 meeting. What meeting would that be?
8 A. The meeting of the Historic
9 Preservation Commission, June 14th, 2006,
10 "Recommendations to City council to adopt 2005
11 windshield survey of historic properties.
12 Discussion and recommendations to City council
13 regarding relocating the First Congregational
14 Church to 580 East Avenue North. Update on the
15 status of the fiscal year, 2006. Certified local
16 government grant project. Tentative discussion
17 of draft, heritage transfer right ordinance."
18 Q. Let me stop you there. Who prepared
19 those agendas?
20 A. I'm not sure. This one and the one
21 before might have been prepared by Stephanie
22 Webster, who was another planner for the City of
23 Ketchum. She was actually the staff planner for
24 the Historic Preservation Commission until I took
25 it over.

1 Q. Do you recall when you took over?
2 A. I don't recall.
3 Q. And when you took it over, would you
4 have been the one to prepare the agenda for the
5 meetings?
6 A. Yes.
7 Q. And I'm going to refer you to the next
8 page of that. Do you recognize the --
9 A. Probably Stephanie's handwriting.
10 Q. Okay. Let's go to the next tab in
11 that. Actually, no. Let's back up. I want to
12 refer you to part of that same tab. There is a
13 document entitled Transfer of Development Rights
14 Program Overview, City of Ketchum. Is that a
15 document that you prepared, or drafted?
16 A. I'm not sure. I probably did, but I
17 can't say for sure.
18 Q. Does it indicate what the purpose of
19 the Transferable Development Rights Program is?
20 A. It does.
21 Q. What is that purpose that is stated
22 there?
23 A. It says, "The purpose of the Transfer
24 of Development Rights Program is to encourage the
25 preservation of heritage landmarks, those

1 properties listed on the Ketchum inventory for
2 historic landmark sites and structures. The
3 Ketchum TDR program permits those property owner
4 of heritage landmarks to sever and convey as a
5 separate development right undeveloped floor area
6 to be developed on a different and nonheritage
7 property within the City of Ketchum. The program
8 enables standard market forces and the demand for
9 residential floor area to accomplish a community
10 goal of preserving Ketchum's heritage as
11 reflected in its built environment."
12 Q. And does that comport with your
13 understanding of the purpose of the transferable
14 development rights program?
15 A. Yes.
16 Q. And a couple pages later, there's a
17 document entitled Draft Transferrable Development
18 Rights Program. Do you know who drafted that?
19 A. I'm not sure. Looks like, from the
20 footer, that it might have been from the
21 consulting team that did the downtown master
22 plan. But I'm not really sure.
23 Q. Would you have drafted that, or do
24 you -- you have no recollection of drafting that?
25 A. I could have drafted it. I don't

1 really have a recollection of it.
2 Q. Okay. And again, does it just
3 reiterate the same purpose that was in the
4 document you just talked about previously, the
5 Transferable Development Rights Program Overview?
6 A. Yeah. It expands on it.
7 Q. Okay. If you'd go to the next tab.
8 What's the title of that one?
9 A. HPC Meeting, July 12th, 2006.
10 Q. And HPC would stand for the Historical
11 Preservation Commission meeting?
12 A. Historic Preservation Commission.
13 Q. Do you recall, were you the chair of
14 those meetings when you took over?
15 A. No.
16 Q. Who was the chair?
17 A. I think Jim Racito {phonetic}.
18 Q. Was on on the Preservation Commission?
19 A. Yes.
20 Q. Okay. Do you recall being at this
21 meeting?
22 A. No, I don't recall. And it looks like
23 Stephanie's handwriting again.
24 Q. Okay. How many Historic Preservation
25 Commission meetings would you say you attended ...

1 prior to the enactment of the ordinance?
 2 A. I have no idea.
 3 Q. Would it be five, or would it be
 4 twenty-five?
 5 A. I don't know.
 6 Q. No recollection whatsoever?
 7 A. No. I would have to look back through
 8 all the files to figure that out.
 9 Q. And would you -- you did attend some of
 10 the meetings?
 11 A. Yes.
 12 Q. And you were -- at some point you
 13 replaced -- what was the woman's name?
 14 A. Stephanie Webster.
 15 Q. You replaced Stephanie Webster as the
 16 Ketchum representative from the Planning
 17 Department at the Commission meetings?
 18 A. Right.
 19 Q. I'm going to refer you -- I guess I'll
 20 do that in a moment. We'll come back to that
 21 exhibit in a minute. Let's go back to your
 22 affidavit, which is marked as Exhibit 1, and I'd
 23 ask you to go to Exhibit L. Just take a minute
 24 to look it over if you would, please.
 25 Was that Ordinance No. 1005 the TDR

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1 ordinance you were working on pursuant to the
 2 recommendation in the master plan?
 3 A. Yes.
 4 Q. What was your understanding of the
 5 purpose of the ordinance?
 6 A. It was to preserve -- we already talked
 7 about it. It was back in other exhibit. It was
 8 to preserve historic properties in the City of
 9 Ketchum and downtown.
 10 Q. Okay. And go back to Exhibit F of your
 11 affidavit. Can you identify that?
 12 A. It's a staff report.
 13 Q. And who was that prepared by?
 14 A. By me.
 15 Q. And what was that prepared for?
 16 A. Special Planning & Zoning Commission
 17 meeting, December 11, 2006.
 18 Q. Was that the Planning & Zoning
 19 Commission, one of the meetings to discuss the
 20 Ordinance 1005?
 21 A. Yes.
 22 Q. The TDR ordinance?
 23 A. Yes.
 24 Q. And the focus -- the sending sites were
 25 limited to sites where a historic building or

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1 heritage site was located. Correct?
 2 A. Yes.
 3 Q. And the Historic Preservation
 4 Commission's recommendation was to allow a
 5 historic building property owner to sell their
 6 development rights as an incentive for preserving
 7 the historic building. Right?
 8 A. Right.
 9 Q. And if you would go to Exhibit G, and
 10 can you tell me what that is?
 11 A. It's a notice sent to property owners.
 12 Q. And what was the purpose of that
 13 notice?
 14 A. It was to notify property owners of
 15 public hearings that had been held by the City
 16 council on the TDR program. Talks about the
 17 purpose of the TDR program.
 18 Q. And what is the purpose that's stated
 19 there?
 20 A. To encourage the preservation of
 21 significant buildings and sites representing
 22 local history and heritage within the community
 23 core.
 24 Q. Was that a letter that you sent out?
 25 A. Yes.

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1 Q. To property owners?
 2 A. Yes.
 3 Q. What's the date?
 4 A. February 7, 2007.
 5 Q. Okay. Can you just go to Exhibit H,
 6 please? And what is Exhibit H, for the record?
 7 A. It's -- is --
 8 Q. Just the title.
 9 A. Historic Preservation Commission
 10 Recommended Heritage Sites, November 8, 2006.
 11 Q. And I just have a question, going to
 12 page 3 of that, on the bottom there's a notation,
 13 "NHRP eligibility." Would that be National
 14 Historic Register? What does that NHRP stand
 15 for?
 16 A. I'm not sure exactly. It is something
 17 to do with the national register.
 18 Q. Do you know what the notation IE is?
 19 A. It's ineligible.
 20 Q. Do you think it should be NRHP,
 21 National Register of Historic Places? I wonder
 22 if that's just a typo.
 23 A. Probably.
 24 Q. So the IE is ineligible. Is that
 25 correct?

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1 A. Yes.
 2 MS. BONNEY: Just to clarify, did you
 3 prepare this document, Exhibit H?
 4 THE WITNESS: Yes, I did.
 5 BY MS. RIVERS:
 6 Q. Beth, did you ever understand that the
 7 purpose of the TDR ordinance was to protect open
 8 space?
 9 MR. POGUE: Object to the form of the
 10 question.
 11 MS. RIVERS: What's the problem with
 12 the form?
 13 MR. POGUE: Calls for speculation, and
 14 relevance.
 15 BY MS. RIVERS:
 16 Q. You can go ahead and answer.
 17 A. My understanding of the purpose was the
 18 preservation of historic properties.
 19 Q. Did you ever understand the purpose was
 20 to protect wildlife or critical areas?
 21 A. No.
 22 Q. And at the time Ordinance 1005, which
 23 is Exhibit L, was drafted and enacted, was there
 24 undeveloped land within the City of Ketchum?
 25 A. Yes. I believe so.

1 Q. The city wasn't built out. Is that
 2 correct?
 3 A. That's correct.
 4 Q. Okay. In fact, places like Reinheimer
 5 Ranch, is that in the City of Ketchum?
 6 A. I believe so.
 7 Q. And that's open space. Correct?
 8 A. Yes.
 9 Q. And Nob Hill, the undeveloped part, is
 10 that in the City of Ketchum?
 11 A. Yes.
 12 Q. And that's undeveloped. Correct?
 13 A. I think the nob itself.
 14 Q. The nob itself. Correct.
 15 Q. And the Big Wood Golf Course, is that
 16 in the the City of Ketchum?
 17 A. Yes.
 18 Q. And is there open space as part of the
 19 golf course?
 20 A. Yes.
 21 Q. And the hills above the golf course, up
 22 to the Sun Valley city line, is that in the City
 23 of Ketchum?
 24 A. I would guess so.
 25 Q. And are they undeveloped?

1 A. The hills? I believe so.
 2 Q. Okay. At the time -- and actually,
 3 strike that. In fact, Ordinance 1005 actually
 4 had a provision that stated the development
 5 rights were not to be severed from vacant lots.
 6 Correct?
 7 A. Correct.
 8 Q. Okay. And just for the record, Trail
 9 Creek runs through the City of Ketchum. Correct?
 10 A. Yes.
 11 Q. And Warm Springs Creek?
 12 A. Yes.
 13 Q. And the Big Wood River. Correct?
 14 A. Correct.
 15 Q. Okay. Now, I'm going going to refer
 16 you back to Exhibit 2, the Administrative Record.
 17 A. I just want to clarify, part of the
 18 purpose of the TDR Ordinance, it was for the
 19 preservation of historic buildings, but also of
 20 scale, of the smaller scale of downtown.
 21 Q. And just getting to that, let me ask
 22 you something. The way the Ordinance 1005 was
 23 drafted, the receiving sites and the sending
 24 sites were intermixed throughout town. Correct?
 25 A. Yes. I think so.

1 Q. And would it be possible for a sending
 2 site to develop -- to sell its rights to the
 3 receiving site next door, if there was a
 4 receiving site?
 5 A. I think so, but I'm not sure. I would
 6 have to read the ordinance again. It's been a
 7 long time.
 8 Q. Okay. Why don't you take the time to
 9 do that and let me know.
 10 MS. BONNEY: For my clarification, was
 11 this only within the community core?
 12 THE WITNESS: Yes.
 13 MS. RIVERS: Ordinance 1005 is L.
 14 MS. BONNEY: Are we asking for her
 15 legal interpretation of the ordinance?
 16 MS. RIVERS: Well, she said she'd have
 17 to look back through the ordinance. I asked if
 18 it would be possible for a sending site to sell
 19 its development rights to the property next door
 20 if it was a receiving site. And she said she
 21 didn't know, she'd have to look back at the
 22 ordinance.
 23 THE WITNESS: I think just generally.
 24 BY MS. RIVERS:
 25 Q. Actually, would you answer my question.

1 first? Would it be possible for someone who had
2 a sending site to sell their development rights
3 to a property if it was a receiving site, if it
4 was next door to them?

5 A. I think generally the idea is that a
6 sending site can transfer to a receiving site, if
7 it's designated.

8 Q. So it doesn't matter where the
9 receiving site is, as long as it's designated a
10 receiving site?

11 A. I think so.

12 Q. If you'll look at the -- the sending
13 and receiving sites are interspersed throughout
14 the community core. Correct?

15 A. Correct.

16 Q. And it's not as though all the sending
17 sites are in one area and all the receiving in
18 another area.

19 A. Right.

20 Q. In fact, there's sending and receiving
21 right next door to each other. Correct?

22 A. If you can show me a color copy.

23 Q. I will. I think this is a color copy.

24 I don't think I have a color copy of that one.

25 I'm not sure. But I think if you'll look closely

1 at that, the black and white, the shaded is the
2 sending site, the slash lines are Phase II
3 sending site, receiving site are clear. Right?

4 A. Uh-huh. But there's two clear ones and
5 they're different, so I wouldn't be able to --

6 Q. I'm going to show you what's been
7 marked Exhibit 4, and that is Ordinance 1034. Do
8 you recognize that ordinance at all?

9 A. No.

10 Q. I'm going to represent to you that it
11 is the ordinance -- did you work on that
12 ordinance at all when it was initially being
13 restated and redrafted?

14 A. I'm not sure.

15 Q. Okay. I'm going to ask you to compare
16 the list of sending sites in Ordinance 1034,
17 which has been marked as Exhibit 4, to the list
18 of sending and receiving sites in Exhibit L,
19 which is Ordinance 1005. Would you just go
20 through and compare them and tell me if they are
21 identical or if there are any changes that you
22 can tell.

23 A. Well, I see one change.

24 Q. Which one is that? Can you tell me
25 which property?

1 A. Looks like the legal description is the
2 same. In one table it's noted as 580 North Main
3 Street, and the other it's noted as Sixth Street
4 and Main, but the legal description appears to be
5 the same. And Ordinance 1034 there's a strike
6 through for 520 East Second Street.

7 Q. And is that the last one on that page?

8 A. Yes. Then there's an addition in 1034
9 of 520 East Second Street.

10 Q. So it was stricken on the first page of
11 that, but added at the end. Is that right?

12 A. Yes.

13 Q. And is 520 East Second Street on
14 Ordinance 1005?

15 A. Yes. It was the last listing on the
16 first page of the table.

17 Q. So the sending sites are the same on
18 1034 as on 1005. Is that correct?

19 A. It appears to be that way.

20 Q. Okay. And does it list the receiving
21 sites, or does just list the sending?

22 A. I think it's just the sending.

23 Q. I'm going to have you look at

24 Ordinance 1034, and say Exhibit 4, and ask you
25 again -- the receiving sites under that ordinance

1 and the sending are interspersed throughout the
2 town. Correct?

3 A. Correct.

4 Q. And the receiving sites aren't lumped
5 in one area and the sending in another area.
6 They're all mixed throughout. Correct?

7 A. Right.

8 Q. Okay. Now, I'm going to have you look
9 back to Exhibit -- strike that. And if you look
10 at the receiving and sending sites in 1034, and
11 assuming the sending sites are the same as 1005,
12 which you just stated, again, some of the sending
13 are right next to the receiving sites. Correct?

14 A. Correct.

15 Q. So as a hypothetical, if a one-story
16 sending site wanted to sell its development
17 rights to the building next door, then it's
18 possible that you'd have a one story right next
19 to a four-story building. Correct?

20 MS. BONNEY: Objection. Calls for a
21 legal conclusion. Go ahead and answer.

22 THE WITNESS: Correct.

23 BY MS. RIVERS:

24 Q. And Beth, do you consider yourself an
25 expert in planning?

1 MR. POGUE: Object to the form of the
2 question.
3 BY MS. RIVERS:
4 Q. Beth, you have a lot of training in
5 planning. Correct?
6 A. Correct.
7 Q. You have a Masters degree in it.
8 Correct?
9 A. Correct.
10 Q. And you indicated that part of your
11 training it is drafting ordinances. Correct?
12 A. Correct.
13 Q. Who made the initial draft of this,
14 Ordinance 1005?
15 A. I did.
16 Q. Thank you. Now I'm going to take you
17 back to Exhibit 2, the record, the Administrative
18 Record in this case, which is again Exhibit 2.
19 And I'm going to refer you to -- I'm going to
20 refer you to the tab that has the P & Z meeting
21 September 24th, 2007. It's the other counsels'
22 eighth tab back. And towards the end of that,
23 the document in that tab, is -- looks like an
24 Excel spreadsheet of sorts.
25 A. Um-hum

1 Q. One of them says at the top, Property
2 Eligible For National Register. Is that correct?
3 A. Well, yeah. It's cut out, but yeah,
4 I'm sure it's National Register.
5 Q. And this -- do you know when this
6 document was prepared or who might have done
7 that?
8 A. I don't know when it was prepared. I
9 prepared it.
10 Q. You prepared that. Okay. Actually,
11 later on in this record, there's another one with
12 a footer on it, back at about seven tabs back
13 further at the TDR Analysis, in the section
14 entitled TDR Analysis. Bear with me while I find
15 it. You might recognize this one. Okay. Does
16 this appear to be the same document, just a
17 lengthwise version?
18 A. Well, I don't know if it's the same
19 document.
20 Q. Okay. What's the title on this one?
21 A. Eligible for National Register.
22 Q. And there's a date on the bottom of
23 that.
24 A. Says Sending Sites, 02/22/07.
25 Q. Does that refresh your recollection of

1 when you might have put that document together?
2 A. Well, I put this particular document
3 together 02/22/07.
4 Q. And does that list the sites -- sending
5 sites that are eligible for the National Historic
6 Register?
7 A. Yes.
8 Q. And why did you prepare that? Do you
9 recall?
10 A. It was in the process of designating
11 sending sites, and we went through various
12 versions of different sorts of priority levels
13 for different sites.
14 Q. And does that characterize all of the
15 sending sites under that ordinance, 1005?
16 A. Well, it should.
17 Q. Okay. And how many sites are
18 identified as Eligible for National Register?
19 A. Four.
20 Q. And is that the National Register of
21 Historic Places? Is that what you mean by that?
22 A. Yes.
23 Q. And why are there only four?
24 A. Because there's only four properties in
25 Ketchum that are eligible for the National

1 Register.
2 Q. Okay. Does it -- does Eligible For
3 National Register mean that they meet the
4 criteria for listing on the National Register of
5 Historic Places?
6 A. Yes.
7 Q. And those four sites are in the
8 community core?
9 A. Yes.
10 Q. Can you just tell me what the names of
11 those sites are?
12 A. The Griffith House, Lewis Lemon
13 Griffith Store, the Lon Price, Esther Fairman
14 House, the Forest Service Park.
15 Q. And are those sites that are listed as
16 eligible for listing in the National Register
17 identified as sending sites in Ordinance 1005?
18 A. They should be, yes.
19 Q. And are any of the other sites
20 identified in Ordinance 1005 eligible for listing
21 in the National Register of Historic Places?
22 A. No. Those are the only four.
23 Q. Okay. And I'm going to have you look
24 at Ordinance 1034, which is marked as Exhibit 4,
25 and would you just, if -- we can go off the

1 record while you take a little time. I'd like
2 you to compare it to Ordinance 1005, the one that
3 you worked on, then I'd like to ask you to --
4 just about some of the changes.

5 MR. POGUE: I'm going to object. Go
6 ahead, Stephanie.

7 MS. BONNEY: I certainly am going to
8 object to that, one, because she didn't work on
9 1034; but more importantly, the documents speak
10 for themselves.

11 MR. POGUE: And I'll reiterate the
12 objection. She's testified she did not work on
13 the ordinance, was not involved with it, that is
14 essentially an administrative or clerical task,
15 and going through and comparing differences and
16 asking her to speculate on why they might be
17 there, when she has no idea. So aside not being
18 a good use of time, I think the question is
19 improper.

20 MS. RIVERS: She's obviously an expert
21 in planning, and she drafts ordinances, could
22 probably testify to this. But what I'll do, I
23 have some very specific questions about the floor
24 area ratio sections, which I think are identical,
25 so I'll just ask those questions.

1 BY MS. RIVERS:

2 Q. First, tell me how -- what I'd like you
3 to do -- actually, let's back up. Ordinance 1005
4 refers to heritage sites. At some point, did the
5 term historic change to heritage, or why were
6 they called heritage sites?

7 A. The idea with the term heritage site
8 was that there are other sites that are of value
9 historically to the City that may not be eligible
10 for the National Register. So all the properties
11 together were referred to as heritage sites.

12 Q. And I want to ask you a little bit
13 about Ordinance 1005, and how it works, what
14 was -- first of all, that applied to the
15 community core district. Correct?

16 A. Correct.

17 Q. And in that district, what, while you
18 were working for the City of Ketchum, were the
19 existing height limits?

20 A. I don't remember.

21 Q. Okay. And under -- what was your
22 understanding of the ordinance, or how did you
23 draft it? If a building sold development rights
24 to a receiving site, could a receiving site
25 development more -- to a greater height on their

1 property than otherwise?

2 A. Yes.

3 Q. How much higher?

4 A. I don't recall.

5 Q. Could they go an additional story?

6 A. I don't recall exactly.

7 Q. You have no recollection of the
8 ordinance that you drafted as to whether you
9 could go from a three-story building on a site to
10 a four story?

11 A. Not off the top of my head.

12 Q. Well, if you went back to the
13 ordinance, would that refresh your recollection?

14 A. Yes, it should.

15 Q. Okay. Why don't you look at that.

16 A. Okay. It says here in the ordinance,
17 "Affixing development rights through the process
18 set forth herein allows the construction of a
19 specified amount of floor area square footage on
20 a fourth floor on a designated receiving site."

21 Q. So I want to ask you a little bit
22 about, also, floor area ratio, because that's
23 referred to a lot in the ordinance. Under the
24 zoning existing at the time, what could someone
25 develop -- what was the floor area ratio in that

1 district that they could use to develop their
2 property. Do you recall?

3 A. I don't.

4 Q. Okay. And how does floor area ratio
5 work? Tell me. I don't really understand it.

6 A. It's the area of a building divided by
7 the area of the lot, the square footage of the
8 building.

9 Q. Would you say all floors of the
10 building? When you say square footage, do you
11 mean of the footprint of the building, or every
12 floor?

13 A. Should be every -- should be every
14 floor.

15 Q. Okay. And tell me again, it's the
16 square footage divided --

17 A. Of the building, divided by the area of
18 the lot.

19 Q. Okay. If somebody on one lot has a one
20 floor area ratio, and the person on the next lot
21 has a two floor area ratio, what does that mean?
22 And they're the same size lot, say.

23 A. Well, the one lot is covered with
24 one-story building, and the other has two
25 stories.

1 Q. How does that translate to floor area
2 ratio?

3 A. The floor area ratio, the one that has
4 one, has -- just in terms of blocks. It could be
5 pieced together differently, but just very simple
6 version.

7 Q. Right.

8 A. Floor area ratio of one, you could have
9 your entire lot covered with one story of
10 building. If you have a floor area ratio of two,
11 you could have your entire lot covered with two
12 story of building.

13 Q. So is it fair to say that a higher
14 floor area ratio means that you can develop the
15 property denser?

16 A. Yes.

17 Q. More stories?

18 A. Yes.

19 Q. Okay. And is it fair to say that the
20 way Ordinance 1005 works is that if you preserve
21 a historic site on your property, you could sell
22 development rights, a greater amount of
23 development rights to, than would otherwise be
24 able to build on that property?

25 A. No. You can't sell more development

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1 rights that you could build, normally.

2 Q. If your property is under the current
3 zoning of floor area ratio of one, under the
4 ordinance, if you designate it as a sending site
5 and sell development rights, you can sell floor
6 area ratio development rights of two. Correct?

7 A. My understanding is each property --
8 again, just sort of conceptually, each property
9 under the zoning regulations is allowed, has a
10 right to develop X amount of area. And if you
11 agree to preserve your building, you can take
12 whatever development right is above and beyond
13 the amount that's occupied on the site. You can
14 sell that additional square footage to another
15 property.

16 Q. So is it fair to say it's a wash, then,
17 between the development that you could do on your
18 sending site, if you don't do it, you sell that
19 amount to a receiving site? So it's a wash in
20 terms of developable space?

21 A. That's my understanding, yes.

22 Q. Okay. And do you recall the
23 restriction in the ordinance about receiving
24 sites being adjacent to a hundred foot avenues?

25 A. I recall there being something, but I

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1 don't know exactly.

2 Q. You don't recall whether that was
3 eliminated or whether it was recommended or
4 anything like that?

5 A. I don't recall. I don't recall.

6 Q. Okay. Let me just repeat the question.
7 I forget. Did you say you put together the first
8 draft of the Ordinance 1005?

9 A. Yes.

10 Q. Okay. And in drafting those
11 provisions, what authority did you look at to
12 determine what you would need to include in the
13 ordinance, if any?

14 A. Well, I don't really remember. I mean,
15 I'm sure I looked at State code, but I don't
16 remember exactly.

17 Q. You don't remember what statutes you
18 looked at?

19 A. No.

20 Q. Okay. Did you look at the Idaho
21 statutes when you were working on it?

22 A. Yes.

23 Q. Okay. I'm going to just -- I don't
24 have too much more here. But I would like you to
25 look at -- I'm going to show you Title 67 of the

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1 Idaho Code. Are you familiar with this book?

2 A. Um-hum. Yes.

3 Q. And I'm going to ask you -- I'm going
4 to refer you to Chapter 46. Have you looked
5 through that section before?

6 A. I'm sure I have.

7 Q. And do you recall looking at that
8 section when you drafted this ordinance?

9 A. I probably did.

10 Q. You don't know for sure?

11 A. I mean, I probably did.

12 Q. Just -- you say you probably did,
13 simply because -- why do you say you probably?

14 A. Because I don't remember exactly
15 everything I did in preparing this ordinance.

16 Q. Okay. Let me ask you something. Did
17 the City of Ketchum, while you were working
18 there, establish a historical district by
19 ordinance?

20 A. I don't know.

21 Q. You don't know --

22 A. I don't recall if they did or not.

23 Q. Okay. Do you recall them -- you don't
24 recall if they did or not. Do you recall ever
25 seeing a historic district ordinance or working

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1 on that for the City of Ketchum?
 2 A. I don't believe so.
 3 Q. You did not work on one?
 4 A. I don't believe so, no.
 5 Q. And today, do you know if Ketchum has a
 6 historic district ordinance? An ordinance
 7 establishing a historic district?
 8 A. I don't know.
 9 Q. Does the term a Certificate of
 10 Appropriateness mean anything to you?
 11 A. It kind of rings a bell, but I don't
 12 remember exactly.
 13 Q. Why does it ring a bell?
 14 A. Because it sounds like some terminology
 15 we were using in the administrative part of the
 16 TDR ordinance.
 17 Q. Okay. Do you remember drafting a
 18 provision in your ordinance about a Certificate
 19 of Appropriateness?
 20 A. I don't remember specifically.
 21 Q. Okay. Why don't you look through that
 22 ordinance and tell me if there's anything in
 23 there about a Certificate of Appropriateness.
 24 MS. BONNEY: Objection. Calls for a
 25 legal conclusion, and the record speaks for

1 been done differently.
 2 Q. And in working on Ordinance 1005, did
 3 you or anyone in your department do a market
 4 analysis?
 5 A. Yes.
 6 Q. Of the sites? And what was the title
 7 of that document?
 8 A. I don't know.
 9 Q. Was it attached to your affidavit,
 10 or --
 11 A. Yeah. I think so. No. I don't see it
 12 here. I thought it was referred to and attached.
 13 And I'm not sure if what I'm thinking of is what
 14 you were asking about. It was just an analysis
 15 of the supply and demand. The quantity of
 16 sending sites and receiving sites, and -- it was
 17 like a supply and demand kind of basic analysis.
 18 Q. Was it an analysis that studied the
 19 capacity -- the receiving areas, whether the
 20 receiving areas had the capacity to accommodate
 21 the number of development rights?
 22 A. Right. Right.
 23 MS. RIVERS: I don't have any other
 24 questions. Thanks.
 25 MS. BONNEY: Can we take a five-minute

1 itself.
 2 THE WITNESS: I'm not seeing anything.
 3 BY MS. RIVERS:
 4 Q. While you were working for the City of
 5 Ketchum, did you ever pass an ordinance
 6 specifically designating historic properties?
 7 MS. BONNEY: Objection. Could you
 8 clarify, Did you pass an ordinance?
 9 BY MS. RIVERS:
 10 Q. Did the City of Ketchum, to your
 11 knowledge, pass an ordinance designating historic
 12 properties?
 13 A. I think that was part of the TDR
 14 ordinance.
 15 Q. Okay. And when you say you think it
 16 was part of it, tell me what part of it
 17 designates historic properties.
 18 A. I think the criteria in the designation
 19 of sending sites and that table was essentially
 20 designating those sites.
 21 Q. So you're saying that -- naming the
 22 sending sites there was -- and -- along, as part
 23 and parcel of the TDR ordinance, was Ketchum's
 24 ordinance designating historic properties?
 25 A. That's my recollection. It may have

1 break, please?
 2 MR. POGUE: Sure
 3 (A Break Was Taken.)
 4 MS. BONNEY: I assume we're back on the
 5 record. I have no questions.
 6 MR. POGUE: I have no questions.
 7 (Deposition Concluded at 11:15 a.m.)
 8 (Signature Was Requested.)
 9 * * * * *

1 REPORTER'S CERTIFICATE

2 I, DIANA KILPATRICK, CSR No. 727,
3 Certified Shorthand Reporter, certify;

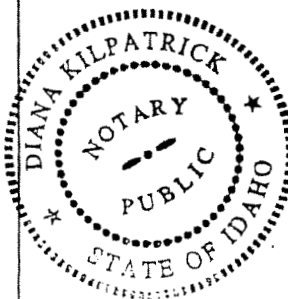
4 That the foregoing proceedings were taken
5 before me at the time and place therein set
6 forth, at which time the witness was put under
7 oath by me;

8 That the testimony and all objections made
9 were recorded stenographically by me and were
10 thereafter transcribed by me, or under my
11 direction;

12 That the foregoing is a true and correct
13 record of all testimony given, to the best of my
14 ability;

15 I further certify that I am not a relative
16 or employee of any attorney or party, nor am I
17 financially interested in the action.

18 IN WITNESS WHEREOF, I set my hand and seal
19 this 14th day of October, 2008.



Diana Kilpatrick

DIANA KILPATRICK, CSR, RPR

Notary Public

Hailey, Idaho 83333

My Commission expires January 13, 2011

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Date: 1/20/2009

Fifth Judicial District Court - Blaine County

User: PAIGE

Time: 09:01 AM

Minutes Report

Page 1 of 2

Case: CV-2008-0000837

KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

Selected Items

Hearing type:	Motion for Summary Judgment	Minutes date:	01/12/2009
Assigned judge:	Robert J. Elgee	Start time:	03:00 PM
Court reporter:	Susan Israel	End time:	04:25 PM
Minutes clerk:	Rosa Stinnett	Audio tape number:	D160

Parties: Fritz Haemmerle; for Plaintiff
Stephanie Bonney; for Defense
Ed Lawson; for Other Party

Tape Counter: 300 This cause came regularly before the Court this day for a hearing on Motion for Summary Judgment. Fritz Haemmerle was present on behalf of the Plaintiff; Stephanie Bonney was present on behalf of the Defendant. Also present was Mike Pogue on behalf of 206 First.

The Court introduced this matter.
The Parties were prepared to proceed.

Tape Counter: 305 Haemmerle speaks on behalf of KGF Development. Supplemental affids. have been submitted. At this time, these are made part of the record. All in agreement. He then proceeds to confirm binders 1, 2, 3 and exhibit part 1, part 2 and 3 are contained in binders as well.

Tape Counter: 306 All briefs have been reviewed and hearing will now proceed.

Tape Counter: 308 Haemmerle presents challenge to City of Ketchum ordinance 10-34. He questions purpose of the second TDR ordinance, and statute 67-4619. Deposition of Beth Robrahn testified that only 4 sites were historical according to the National Register. He does not believe court can apply 67-4612.

Tape Counter: 318 Court asks for clarification on 67-4619, as designated by 67-4614.

Tape Counter: 319 Haemmerle continues.

Tape Counter: 321 Court questions Haemmerle that there may be a difference in historical sites within a city to that of one as designated as historic by the State.

Tape Counter: 323 Haemmerle continues. He speaks of 67-4612 as a zoning protection place that might allow authority to the city for an historic site. Argument is heard on 67-6511.

Tape Counter: 328 Court then speaks on TDR's.

Tape Counter: 330 Haemmerle continues that the TDR's did go through the political process.

Tape Counter: 332 Court speaks of sending and receiving sites.

Tape Counter: 333 Haemmerle speaks of designated sending sites.

Tape Counter: 335 Court continues in regards to non-uniformity in order to protect Historic site.

Tape Counter: 337 Haemmerle speaks that the legislature should resolve the problems. Court should rule on fatal flaws and legislature should fix them. Court should not be in the business to fix the legislature problems.

Tape Counter: 338 Court does not want to fix anything. All the court can say is this is how it reads. Court is not allowed to duck the issue.

Court Minutes - 1

Date: 1/20/2009

Fifth Judicial District Court - Blaine County

User: PAIGE

Time: 09:01 AM

Minutes Report

Page 2 of 2

Case: CV-2008-0000837

KGF Development, LLC vs. City Of Ketchum, Idaho, A Municipal Corp

Selected Items

Tape Counter: 340

Haemmerle speaks further of 67-4614 and asks court to read this.

Tape Counter: 341

Court has no further questions. At this time, Bonney will present argument.

Tape Counter: 341

Bonney speaks of reasonable relationship and if there is a conflict. The transfer of development rights is then discussed. Her question: Is there a direct or implied conflict? Historic preservation has very broad language. She addresses uniformity argument. City has created three different classes: sending, receiving and those that are neither sending or receiving.

Tape Counter: 354

Court has no questions. At this time Mike Pogue presents his argument for TDR statutes under LUPA 6515A(1). 67-4601 is discussed as well.

Tape Counter: 400

Court has no questions of Pogue.

Tape Counter: 400

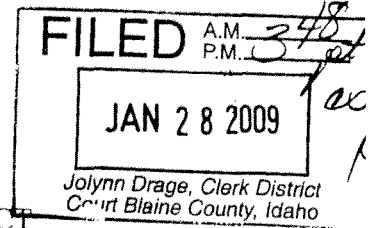
Haemmerle speaks at this time. He believes statute 67-4601 is clear and to the point. General provisions cannot be in conflict with police power. Robrahn's deposition indicated 4 properties designated. He argues is does not qualify for LUPA.

Tape Counter: 406

Court speaks. He presents ruling. City has not exceeded authority. If city was acting in a preempted authority, then yes it would have to look at preempted. Water, taxes and hazardous wastes is one area. TDR's are not an area that the State intends to regulate. The court references cases 07-250 and 08-167. Statute 67-4614 does not restrict the rights of cities and counties of findings of historical properties. This is a grant of authority no preempted by the State. TDR sites are arguable. Benewa County case language allows for general authority of the cities. Dangerous of the Court to say the City has acted beyond bounds. Under 67-4612 the sending sites can be designated without going through 67-4614 process. Attorney fees are discussed, but none awarded at this time. Other issues need to be resolved yet. Arguments of city and developer are accepted under 67-6515A. Motion for summary judgment is denied.

Tape Counter: 425

Court in recess at this time.



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Plaintiff,

VS.

CITY OF KETCHUM, a municipal corporation
of the State of Idaho

Defendant.

260 FIRST LLC,

Intervenor.

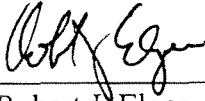
Case Nos.: CV-08-837

JUDGMENT

The Court having determined upon Plaintiff KGF DEVELOPMENT, LLC's Motion for Summary Judgment, heard on January 12, 2009, that City of Ketchum Ordinance No. 1034, enacted on or around February 19, 2008, is not invalid for reason of being adopted with improper authority, and upon the stipulated motion of the parties:

NOW THEREFORE, THE COURT DOES ORDER, that Plaintiff is not entitled to the Declaratory Relief prayed for in its Complaint, and Judgment is entered against Plaintiff KGF DEVELOPMENT, LLC. Each party shall bear its own attorneys' fees and costs incurred in the action.

DATED: January 28, 2009

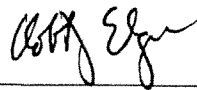


Hon. Robert J. Elgee
District Court Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 28 day of January 2008.



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2009 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz Xavier Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333
Fax: (208) 578-0564


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☐ Overnight Mail
☐ Telecopy

Stephanie Jaymes Bonney
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock, Ste. 520
Boise, ID 83702
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Michael D. Pogue
Lawson & Laski, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
Telephone 208.725.0055
Facsimile 208.725.0076

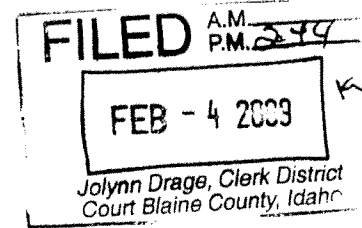
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy



Clerk of the Court

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
tel: (208) 578-0520
FAX: (208) 578-0564
ISB # 3862



Attorneys for Plaintiff/Appellant.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Plaintiff/Appellant,

vs.

CITY OF KETCHUM, a municipal
corporation of the State of Idaho,

Defendant/Respondent,

260 FIRST LLC,

Intervenor/Respondent.

) Case No. CV-08-837

) NOTICE OF APPEAL

) Fee: T - \$15.00 District Court
) \$86.00 Supreme Court

TO: THE ABOVE-NAMED RESPONDENT, CITY OF KETCHUM, AND ITS ATTORNEY,
STEPHANIE JAYMES BONNEY, OF THE FIRM MOORE, SMITH, BUXTON & TURCKE,
CHTD., 950 W. BANNOCK, STE. 520, BOISE, IDAHO, 83702; AND TO INTERVENOR 260
FIRST LLC., AND ITS ATTORNEY MICHEAL D. POGUE, OF THE FIRM LAWSON &
LASKI, PLLC., P.O. BOX 3310, KETCHUM, IDAHO 83340 AND THE CLERK OF THE
ABOVE-ENTITLED COURT

1. The above-named Appellant, KGF DEVELOPMENT, LLC, appeals the Court's

NOTICE OF APPEAL - 1

Decision granting summary judgment on January 12, 2009, and the resulting Judgment dated January 28, 2009 entered in accordance with the Court's Decision, Honorable Robert J. Elgee, District Judge for the Fifth Judicial District, in and for the County of Blaine, presiding.

2. That the party has a right to appeal to the Supreme Court, and the judgment described in paragraph 1 is appealable pursuant to I.A.R. 11(a)(1).

3. Issues on Appeal: Whether the trial court erred in denying Plaintiff/Appellant's motion for summary judgment and granting summary judgment to Respondents, as a matter of fact and law, which ruling raises the following issues:

- a. Whether Ordinance 1034 exceeds the City of Ketchum's authority under Section 67-6515A of the Local Land Use Planning Act ("LLUPA")?
- b. Whether Ordinance 1034 exceeds the City of Ketchum's authority under the Historic Preservation Act?
- c. Whether the City of Ketchum has implied authority to adopt Ordinance 1034?
- d. Whether KGF is entitled to attorney's fees and costs?

4. No order has been issued sealing all or any portion of the record.

5. a. Is a reporter's transcript requested? Yes.

b. The Appellant requests the preparation of the following portions of the reporter's transcript: The oral argument from the hearing on the Motion for Summary Judgment dated January 12, 2009.

c. The Appellant requests does not request preparation of the transcript in a compressed format.

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- a. All documents, affidavits, discovery responses, records, transcripts, and

exhibits submitted in support of KGF's Motion for Summary Judgment in the District Court including:

1. KGF's Motion for Summary Judgment.
2. Affidavit of Kathleen E. Rivers dated December 15, 2008, including Exhibits 1-4 that were attached to the Affidavit.
 - a) Exhibit 1 was the complete legislative history for Idaho Code Section 67-6515A;
 - b) Exhibit 2 was the complete legislative history for Idaho Code Section 67-4619 of the Historic Preservation Act; and
 - c) Exhibit 3 was the Deposition of Sandy Cady, which Deposition included Exhibits 1-3 to the Deposition.
 - (i) Cady Deposition Exhibit 1 was the Agency Record in Blaine County Case No. 07-250 on the adoption of Ordinance 1005;
 - (ii) Cady Deposition Exhibit 2 was the Agency Record in Blaine County Case No. 08-233 on the adoption of Ordinance 1034; and
 - (iii) Cady Deposition Exhibit 3 was the Affidavit of Beth Robrahn, including Exhibits A-L attached to it, filed in Blaine County Case No. 07-250.
 - d) Exhibit 4 was the Deposition of Beth Robrahn in Blaine County Case No. 08-233.
3. Affidavit of Barry Luboviski, dated December 12, 2008.
4. Affidavit of Kevin Fortun, dated December 12, 2008.

5. Affidavit of Fritz X. Haemmerle, dated December 12, 2008, with Exhibits 1. Exhibit 1 is Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions.

6. Supplemental Affidavit of Fritz Haemmerle, dated January 12, 2009, with attached Exhibits, which are the Deposition of Sandy Cady and the Deposition of Beth Robrahn.

6. Plaintiff's Summary Judgment Brief filed December 12, 2008, and Plaintiff's Reply Brief filed January 6, 2009.

7. The City of Ketchum's Response Brief, filed December 29, 2008, respectively.

8. 260 First's Response Brief, filed December 30, 2008

9. The Judgment with I.R.C.P. 54(b) Certificate.

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter;

(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript, to-wit: \$100.00;

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid. to-wit: \$200.00;

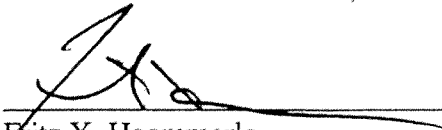
(d) That the appellate filing fee has been paid; and

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 4th day of February, 2009.

HAEMMERLE & HAEMMERLE, PLLC

By:


Fritz X. Haemmerle

CERTIFICATE OF SERVICE


I hereby certify that on the 4th day of February, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Ketchum City Attorney
Attn. Stephanie Jaymes Bonney
MOORE, SMITH, BUXTON & TURCKE, CHTD.
950 W. Bannock, Ste. 520
Boise, Idaho, 83702

Michael Pogue
LAWSON & LASKI
P.O. Box 3310
Ketchum, ID 83340

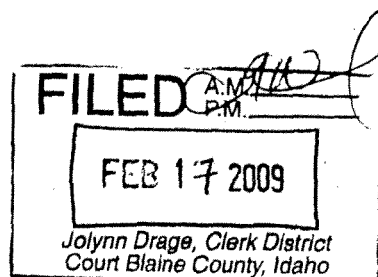
Susan Israel
Court Reporter
201 2nd Ave. South, Suite 106
Hailey, ID 83318

- X By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.
- By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.
- By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.


Fritz X. Haemmerle

EDWARD A. LAWSON, ISBN 2440
MICHAEL D. POGUE, ISBN 6518
LAWSON & LASKI, PLLC
PO Box 3310
Ketchum, ID 83340
Tel. (208) 725-0055
Fax: (208) 725-0076

Attorneys for Intervenor 260 First LLC



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Plaintiff/Appellant,

vs.

CITY OF KETCHUM, a municipal corporation
of the State of Idaho

Defendant/Respondent.

260 FIRST LLC,

Intervenor/Respondent

Case No.: CV-08-837

**REQUEST FOR ADDITIONAL
RECORD**

TO: THE ABOVE NAMED APPELLANT AND THE PARTY'S ATTORNEY OF RECORD,
AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN, that Respondent 260 FIRST LLC in the above entitled proceeding hereby requests pursuant to Rule 19 I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the amended notice of appeal:


- *Affidavit of Scott Roberts in Opposition to Motion for Summary Judgment, filed on April*

17, 2008, in Blaine County Cases CV-07-250 and CV-08-167 (consolidated cases), including all attached exhibits thereto. This Affidavit was incorporated by reference in *260 First's Opposition to Motion For Summary Judgment*, filed on December 31, 2008, which is to be included in the Clerk's Record per Appellant's *Notice of Appeal* (See Section 6(a)(8) (described as *260 First's Response Brief*, filed December 30, 2008).

I certify that a copy of this request was served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED: February 13, 2009

LAWSON & LASKI, PLLC


Michael D. Pogue
Attorneys for Intervenor 260 First LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2009, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz Xavier Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333
Fax: (208) 578-0564

☐ U.S. Mail, Postage Prepaid
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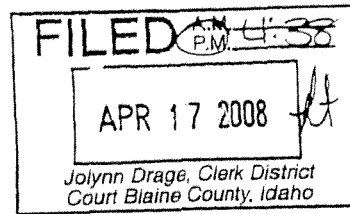
Stephanie Jaymes Bonney
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock, Ste. 520
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Michael D. Pogue

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Tel. (208) 725-0055
Fax: (208) 725-0076



Attorneys for Intervenor 260 First LLC

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

KGF DEVELOPMENT, LLC,

Petitioner-Plaintiff

vs.

CITY OF KETCHUM, a municipal corporation
of the State of Idaho

Respondent-Defendant.

260 FIRST LLC,

Intervenor.

Case Nos.: CV-07-250 and CV-08-167

**AFFIDAVIT OF SCOTT ROBERTS IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Scott Roberts, being first duly sworn, upon oath deposes and says:

1. I am a member of 260 First LLC ("260 First"), the Intervenor in this action. I make the following statements based upon personal knowledge.

2. 260 First is an owner of the real property Lots 5, 6, 7, Block 38, Ketchum Townsite, commonly known as 260 First Avenue, located at Sun Valley Road and First Avenue. This Property is directly west of the Copper Ridge Condominiums, located at Second Street and Washington Ave., owned by Petitioner-Plaintiff KGF Development, LLC.

3. In February 2008 260 First began construction on this site of a four-story, 47,000 square foot retail and residential building at 260 First Avenue consisting of twenty-two market-rate

condominiums and seven deed-restricted affordable units as well as approximately 6,500 square feet of ground floor retail and a 15,287 square foot sub-grade parking garage (the "Project").

4. 260 First has been in negotiations with the City of Ketchum for over three (3) years concerning this Project. Over one year ago, in April 2007, the Project was evaluated by the Ketchum Planning & Zoning Commission, which expressed general approval of the Project. See Exhibit A, Idaho Mountain Express article.

5. On June 5, 2007, 260 First completed its Design Review Application to the City for the Project. See Exhibit B. 260 First subsequently participated in several Design Review meetings with the City Planning & Zoning Commission and the Project application was formally approved by the City on September 10, 2007; the Findings of Fact reflecting the approval were signed on September 24, 2007.

6. In designing and developing the Project, 260 First has relied in part on the Ketchum Transferable Development Right (TDR) Ordinance, adopted on February 22, 2007, as Ordinance No. 1005 by the Ketchum City Council. In the TDR system, certain sites are designated as "sending sites" and have development rights to sell. Property owners in "receiving sites" can buy those rights to create greater density in other parts of town. The TDR Ordinance provides a mechanism for increasing desired density in the community core while at the same time preserving open-spaces and heritage/historic buildings, providing affordable housing in downtown Ketchum, and providing important ground-floor retail spaces which are recognized as crucial in revitalizing the City's downtown core (commonly referred to by the City of Ketchum as Inclusionary Zoning).

7. Furthermore, there were incentives, designed to offset the additional costs of the Inclusionary Zoning required of the developer, which allow larger buildings capable of generating enough additional revenue to offset the cost of the inclusionary zoning (workforce housing units, street level retail, etc.). Without the incentives, the inclusionary zoning adopted by the city would in

actuality be a down-zone from the City's previous zoning code.

8. 260 First has been in negotiations with the owner of Memory Park in Ketchum to purchase TDRs which are necessary for the fourth-floor of the Project. Memory Park is an "open-space" park, and a designated sending site. *See also* Affidavit of Brian Barsotti, the attorney for the owner of Memory Park, filed on August 14, 2007.

9. 260 First has expended approximately \$2,254,922.09 as of May 2008 on Project planning, design, and construction thus far. This amount includes fees for architects, structural engineers, mechanical engineers, marketing consultants, project management costs, demolition, and construction. *See* Exhibit C. Furthermore, approximately \$4.5 million dollars has been expended on land costs based on the TDR entitlement which permits a fourth-floor.

10. Loss of the Project's fourth-floor would significantly dilute the value of the Project and the land, and result in a loss of approximately \$ 6 million. Project planning, design, and construction have proceeded in reliance on the fact that it would have a fourth-floor.

11. On February 4, 2008 260 First obtained its phase I Building Permit (No. 08-002). 260 First proceeded to erect construction fencing the week of February 4, 2008 to make clear the intention to proceed with mobilization, ground breaking, and excavation.

12. The 260 First building site is the former location of one two-story and one three-story commercial building known respectively as the "Heli-Ski" building (comprising 3,190 sq.ft.) and the "Teal Building" (comprising 3,456 sq.ft.). The Teal Building had three commercial spaces and gross monthly income of \$5,200. The Heli-ski building had seven commercial spaces and a gross monthly income of \$4,162. Total gross income for both buildings was \$9,362 which was paid to 260 First, LLC.

13. 260 First began negotiations with The Rotarun Ski Club, Inc. in 2006 to donate the Heli-Ski Building to the club for use at the Rotarun ski hill in Hailey. 260 First has in fact donated the

building, and it was moved off-site by Rotarun in March, 2008. The building is currently at a temporary location in the Sun Valley Company River Run parking lot until Rotarun can coordinate to transport it to Hailey sometime this spring. *See Exhibit D* (photograph of the building in its temporary location)

14. KGF via its attorney Fritz Haemmerle, has presumably known about the specifics and timing of the relocation of the Heli-Ski building. Mr. Haemmerle is the current Vice-President of Rotarun Ski Club, Inc., and has served as a Board Member and its legal counsel. *See Exhibit E* (print-outs from the Idaho Secretary of State)

15. Since the Heli-Ski building tenants have left, 260 First loses monthly rental income from this building of approximately \$4,162 per month.

16. On or around January 15th, 2008, 260 First formally notified the tenants in the Teal Building that the building was scheduled for demolition, and all of the tenants in fact vacated the building by February 28th, 2008. The building was in fact demolished on March 3, 2008. Since the Teal building tenants have left, 260 First loses monthly rental income from this building of approximately \$5,200 per month.

17. Since the demolition and the removal of the Teal and Heli-Ski buildings respectively 260 First has begun construction on the site. In particular, work has proceeded with cutting and capping utilities, demolition, rough grading of the site, erection of construction fencing, installation of project signage, equipment mobilization, Okland Construction's allocation of personnel and equipment, coordination efforts with Idaho Power for permanent and temporary power, etc. 260 First has spent approximately \$172,391 on hard construction costs to date, including demolition of the Teal Building (see attached cost report from Okland Construction, Exhibit F, photos of the construction site, Exhibit G).

18. On or around February 19, 2008 the City enacted Ordinance No. 1034 (the "New

Ordinance"), which is substantially similar to the TDR Ordinance No. 1005, which is the subject of the present suit. This New Ordinance is not subject to any of the purported notice defects that have been challenged with respect to the previous Ordinance No. 1005 by KGF.

19. In light of the fact that 260 First has spent approximately three years and two million dollars on Project planning and construction, 260 First has taken every effort to insure that the Project is designed in conformance with properly enacted City ordinances.

20. Accordingly, in order to avoid potential "notice" problems with TDR Ordinance No. 1005, and protect its substantial investment in the Project, 260 First has submitted a re-design application for its fourth-floor (the only floor subject to TDRs) to the City under the New Ordinance, which will be reviewed by the City Planning & Zoning Commission in several weeks on May 12th, 2008.

21. Now, over a year after the TDR Ordinance was enacted and over a year after KGF filed its original complaint it has raised a new issue in its Motion for Summary Judgment that the City does not have the power to protect historic/heritage sites using TDRs. KGF raised this "historic preservation" issue for the very first time through its attorney Barry Luboviski at a hearing regarding the New Ordinance on February 4, 2008. KGF did not raise the "historic preservation" issue with respect to Ordinance No. 1005 until around February 29, 2008, when it filed its *Statement of Additional Issues* with respect to Complaint No. CV-08-167, the second complaint regarding TDR Ordinance No. 1005.

22. As set forth above, 260 First has already spent significant sums on the Project in reliance on the litigation issues as framed by KGF. The Project is already under construction; KGF has delayed too long. As such, it would be improper and inequitable to halt Project construction at this late date. Moreover, it would subvert the intent of the City in enacting the TDR Ordinance to enhance and revitalize the downtown core while providing community housing at the same time.

SR

Scott Roberts

SUBSCRIBED AND SWORN to before me this 16 day of April 2008.

Margaret Longeway

Notary Public for WASHINGTON

Residing at SEATTLE

My commission expires 4/3/09



AFFIDAVIT OF SCOTT ROBERTS - 6

CERTIFICATE OF SERVICE

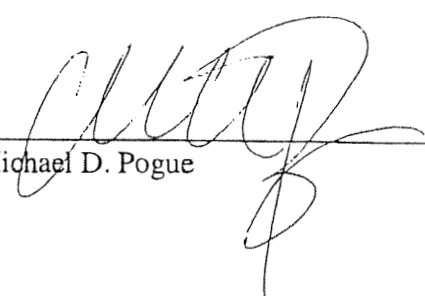
I HEREBY CERTIFY that on April 17, 2008, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz Xavier Haemmerle
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Benjamin Wilbur Worst
City of Ketchum, City Attorney
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Fax: (208) 726-7845

U.S. Mail, Postage Prepaid
☒ Hand Delivered
Overnight Mail
Telecopy



Michael D. Pogue

 [print this page](#)

Large modern building proposed for Ketchum

P&Z hears pre-application design review

by GREG MOORE

The Ketchum Planning and Zoning Commission expressed general approval Monday of a modern-looking, 60,000-square-foot retail and residential building proposed for downtown Ketchum, just west of the Copper Ridge Building.

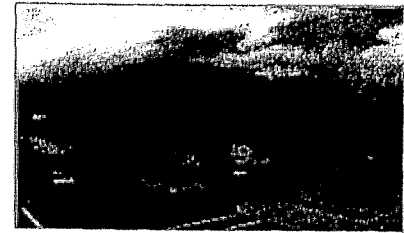
The Justen Co., a Seattle real estate development firm, has proposed to build the four-story building at 260 First Ave. N. Called Gallery 260. It would house at least one art gallery on its ground floor and contain 23 market-rate condominiums and seven deed-restricted residential units.

The proposed design has a flat roof, cedar siding, long vertical expanses of glass, and balconies with horizontal steel members. The building would gain a story beyond that normally allowed by purchasing transferred development rights.

Ketchum Planning and Zoning Commission members expressed general approval of the project during a pre-application, design-review presentation at Ketchum City Hall.

"Overall, I like it," Commissioner Greg Strong said. "I'm a little concerned that it might be a bit on the contemporary side for what people expect here."

"Certain aspects of the building are absolutely gorgeous," P&Z Chair Jack Rutherford said. "It's a little boxy, but I like the whole modern thing. (The Comprehensive Plan) did say 'an eclectic, small Western town'—this is a part of the eclecticism."



Graphic courtesy The Justin Co. A Seattle development firm has proposed to build this four-story, 60,000-square-foot mixed commercial and residential building on First Avenue in downtown Ketchum.

EXHIBIT

A



Despite commenting that the design looked like a professional office building in Los Angeles, Commissioner Deborah Burns also expressed general approval.

Architect Peter Greaves, from the Seattle firm of Weber and Thompson, told the commissioners the intent of the design was to break the building into three sections while maintaining aesthetic coherence. He said concrete walls on the first floor separate the retail section of the building from the upper residential part.

Ketchum's zoning ordinance states that one purpose of its Community Core is to "encourage buildings that respect Ketchum's historical and geographic context while providing diversity." Greaves said the proposed building's cedar siding is "an abstract reference to the Western storefront."

Following Ketchum code, 20 percent of the building's residential section will contain deed-restricted units. Rutherford objected that all those units face the alley between the building and the Copper Ridge building. He said the intent of the ordinance is to spread those units throughout the buildings. Roberts responded that the project would not be profitable without making its market units as desirable as possible to buyers by providing them with good views.

"I thought we had come to an understanding on that one," he said.

Hailey resident Scott Wesley, a board member of the Rotarun Ski Club, urged the board to approve the proposal as soon as possible since The Justen Company has agreed to donate the Sun Valley Heliski

building now on the property for a new base lodge at the ski area west of Hailey. Roberts said in an interview that since the building has tenants, the company will leave it standing until it is ready to build a new one.

The P&Z on Monday also heard a request by The Justen Company and a second developer to reduce the required setback of fourth floors from 25 feet to 15 feet. Commissioners postponed a decision on the matter to a meeting on May 21.

Roberts told them the 25-foot setback requires a considerably beefier deck and does little to hide the upper floor from view.

"It has structural impacts that ripple through the building," he said.

Local architect Dale Bates, who has emphasized passive solar heating in his designs, testified that the proposed change would have little impact on the shadows cast on adjacent buildings.

Strong pointed out that the city's intent is to encourage transfer of development rights by creating the incentive of a fourth floor.

"If we restrict it to the point that it's not financially doable, then we haven't accomplished anything," Strong said.

Rutherford said that if the reduced setback is approved, the city may want to add design guidelines that make roofs more aesthetic.

"We have to be very design sensitive with these fourth floors so we don't walk down the street and say, 'How did this get built?'" he said.

Apparently fearing for its views, KGF Development, the owner of the Copper Ridge building, has filed a lawsuit over the use of transfer of development rights. The suit contends that the city's TDR ordinance violates city and state laws.

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The Idaho Mountain Express is distributed free to residents and guests throughout the Sun Valley, Idaho resort area community. Subscribers to the Idaho Mountain Express will read these stories and others in this week's issue.

06 05 07

GENERAL INFORMATION

PROJECT NAME: Gallery 260

OWNER: 260 First LLC

MAILING ADDRESS: 512 Second Avenue, Suite 200, Seattle, WA 98104

PHONE NUMBER: 206.652.8342

ARCHITECT/REP.: Weber + Thompson PLLC (Brian Steinburg)

MAILING ADDRESS: 425 Pontius Avenue North, Suite 200, Seattle, WA 98104

PHONE NUMBER: 206.344.5700

LEGAL LAND DESCRIPTION: See attached legal description

PROJECT STREET ADDRESS: 260 First Avenue North, Ketchum, ID 83340

FEES PAID: _____ DATE FEES PAID: _____

B. EXCEPTION(S) TO DESIGN REVIEW REGULATIONS (17.64.020) REQUESTED

(list by code number, e.g. A-1, C-2)

17.64.020.4.G Balconies: design regulations. DR, G-1 – The distance between the supports is slightly wider than the height of the balcony bay. See Form D (already sent to City of Ketchum).

C. LAND USE

PERMITTED USE(S): Mixed Use – Residential and Commercial/Retail

CONDITIONAL USE(S): N/A

D. PARKING

TOTAL SPACES REQUIRED: 23

TOTAL PROPOSED: 27 SURFACE: 0 UNDERGROUND: 27

ON-STREET CREDIT REQUESTED: 12

E. SIDEWALK, CURB, & GUTTER

SIDEWALK WIDTH: _____ ft. Existing sidewalk at 1st Avenue: 5'-1"
Existing sidewalk at S.V.R.: 7'-0" (to property line)

F. LOT DIMENSIONS

LOT AREA: 16,500 sq. ft. LOT WIDTH: 165' x 100' ft.

G. FLOOR AREA RATIO

GROSS SQUARE FEET OF DEVELOPMENT ON EACH FLOOR OR LEVEL:

Basement or Underground Parking 15,287 sq. ft. First Floor: 15,259 + 3,527 sq. ft.

Second Floor: 14,407 sq. ft. Third Floor: 14,587 sq. ft. Fourth Floor: 14,557 sq. ft.

GROSS FAR: 2.20

COMMERCIAL SPACE: Ground Floor 5469 sq. ft. Total: 5469 sq. ft.

TOTAL NUMBER OF MARKET RATE RESIDENTIAL UNITS: 30 (if we omit W.F. H. units, we have 23 market rate units)

TOTAL GROSS SQ FT OF MARKET RATE RESIDENTIAL UNITS: 33,454 sq. ft.

List gross sq ft of each numbered unit:

101 = 713 sq ft	200 = 1298 sq ft	300 = 1298 sq ft	400 = 1298 sq ft
102 = 713 sq ft	201 = 1212 sq ft	301 = 1212 sq ft	401 = 2102 sq ft
103 = 713 sq ft	202 = 1370 sq ft	302 = 1370 sq ft	402 = 1381 sq ft
104 = 713 sq ft	203 = 1091 sq ft	303 = 1193 sq ft	403 = 1484 sq ft
105 = 713 sq ft	204 = 803 sq ft	304 = 803 sq ft	404 = 1330 sq ft
	205 = 804 sq ft	305 = 804 sq ft	405 = 1415 sq ft
	206 = 1490 sq ft	306 = 876 sq ft	406 = 1139 sq ft
	207 = 1212 sq ft	307 = 1330 sq ft	
		308 = 1490 sq ft	
		309 = 1212 sq ft	

COMMUNITY HOUSING

Requirement (for Projects over 1.0 FAR): _____ sq ft

Community Housing Requirement = 5163 sq ft

[(Total Gross Sq Ft of Development – Ground Floor Commercial) x 20%] x 85%

Proposed: 5172 sq ft

Percentage Income Categories 4 and 6: 50 % Average: _____

Percentage Income Categories 7 and 10: 50 % Average: _____

I. TRANSFER OF DEVELOPMENT RIGHTS

FOURTH FLOOR, IF PROPOSED: 14,557 gross sq ft

J. SUBDISTRICT

A: _____ B: X C: _____ D: _____

K. BUILDING TYPE

1: _____ 2: _____ 3: X 4: _____ 5: _____ 6: _____

UNIT AREA SUMMARY

UNIT PLAN (UNIT #S)	ADA	TYPE	BUILDING LEVEL	WFH / MARKET	NET SQUARE FOOTAGE
A (200, 300, 400)	TYPE B	2-BED	2, 3, 4	MARKET	1298
B (201, 301)	TYPE B	2-BED	2, 3	MARKET	1212
C (202, 302)	TYPE B	2-BED	2, 3	MARKET	1370
D (203, 303)	TYPE B	2-BED	2, 3	MARKET	1193
E (204, 304)	TYPE B	1-BED	2, 3	MARKET	803
F (205, 305)	TYPE B	1-BED	2, 3	WFH	804
G (306)	TYPE B	1-BED	3	MARKET	876
H (307, 404)	TYPE A	2-BED	3, 4	MARKET	1330
I (206, 308)	TYPE B	3-BED	2, 3	MARKET	1490
J (207, 309)	TYPE B	2-BED	2, 3	MARKET	1212
K (401)	TYPE B	3-BED	4	MARKET	2102
L (402)	TYPE B	2-BED	4	MARKET	1381
M (403)	TYPE B	2-BED	4	MARKET	1484
N (405)	TYPE B	3-BED	4	MARKET	1415
P (406)	TYPE B	2-BED	4	MARKET	1139
V (101)	TYPE B	1-BED TOWNHOUSE	1B + 2	WFH	713
W (102)	TYPE B	1-BED TOWNHOUSE	1B + 2	WFH	713
X (103)	TYPE B	1-BED TOWNHOUSE	1B + 2	WFH	713
Y (104)	TYPE B	1-BED TOWNHOUSE	1B + 2	WFH	713
Z (105)	TYPE B	1-BED TOWNHOUSE	1B + 2	WFH	712

SIGNATURE: _____

SB

SCOTT R. BENTIS

DATE: 6/5/07

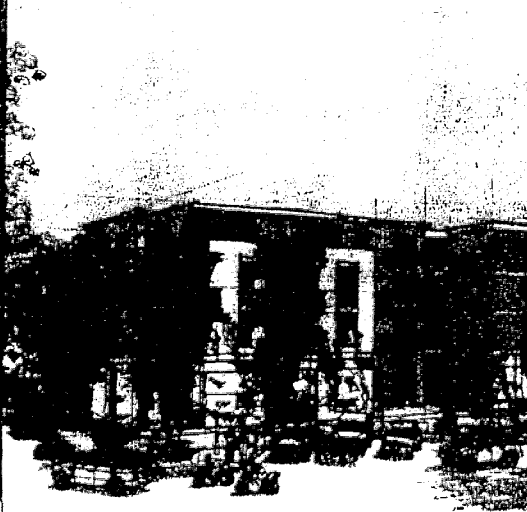
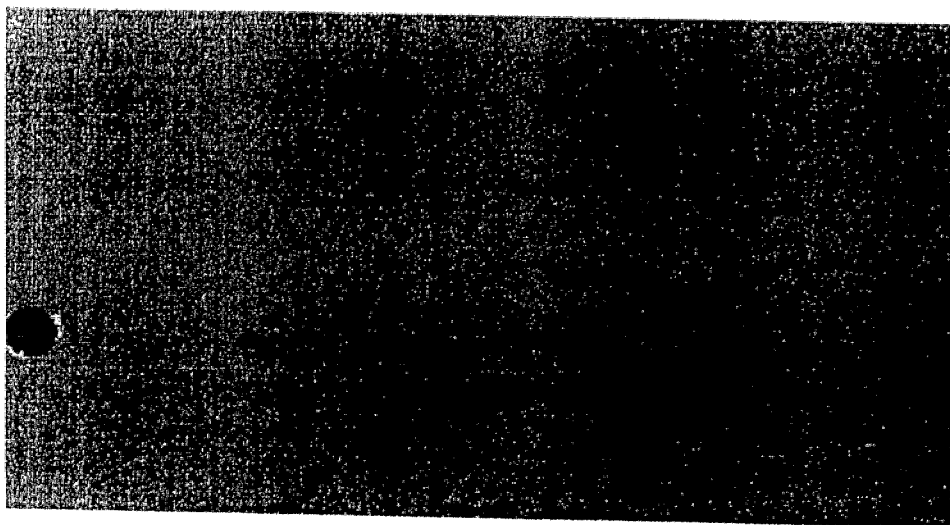
SCANNED UNIT AREA SUMMARY ATTACHED FOR YOUR CONVEIENCE

No. 1866 P. 2

JUN. 5. 2007 1:56PM the ten co

Joint R CC Design Review Application Final 6 4 07.doc

3 n73



GALLERY 260, KETCHUM IDAHO DESIGN REVIEW MEETING

presented by

WEBER+THOMPSON
425 Portius Ave N Suite 200
Seattle WA 98109
206 344 5700
www.weberthompson.com

on

April 23, 2007

to

PLANNING + ZONING
Harold Moniz + Staff Commission

EXECUTIVE SUMMARY

The applicant, 260 First LLC, formed by members of The 260 First LLC, to build a mixed-use development at the intersection of Sun Valley Road and Ketchum Blvd. This location will make it the heart of the new Arts District in Ketchum.

Such a prominent location beckons for the building to be and we have proposed a building which transforms traditional Ketchum's past, with contemporary styling suitable for Ketchum's future.

The 30 unit project will consist of one building with a central and ground floor retail, where two or three art galleries may be open to the public and may be outdoor sculpture display space. Street level retail will front both Sun Valley Road and along Ketchum Blvd. Windows mixed with board formed concrete and wood siding will create a sense of place along this important pedestrian corridor. Bumpouts, stamped and stained concrete, tree grates, planter boxes, and sculpture art, the pedestrian experience will be an exceptional one.

Below the ground floor is one level of accessory parking for the building. On the second floor, the residential portion of the building will contain 23 units consisting mostly of two bedrooms and 7 more affordable units working full time in the community. Exterior siding will feature cast-in-place concrete, creating a building grounded in traditional Ketchum character of crisp urban design. A sophisticated, balanced architectural design that respects the historic core of Ketchum while avoiding a literal replication of historic themes.




The applicant strives to create a fresh new mixed-use development using quality materials and classic forms that will echo the historic character of Ketchum.

THE **JUSTEN**
Company LLC

GALLERY 260 | INTRODUCTION

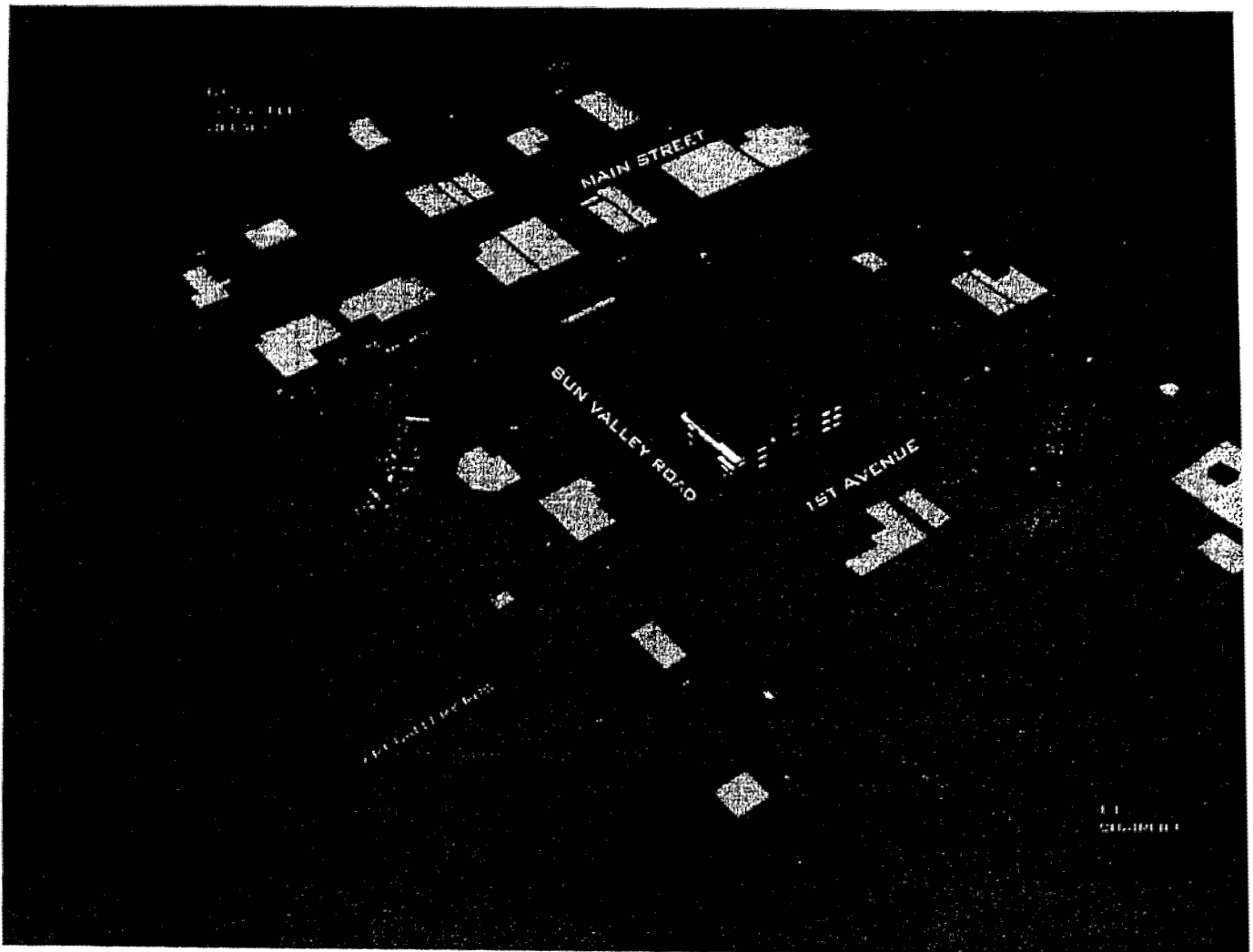
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[illegible][illegible]

	Auto-oriented Through Routes (Primary Routes)
	Auto-Oriented To Routes (Secondary Routes)
	Pedestrian & Cycling-Oriented Primary Routes

GALLERY 260 | SITE CIRCULATION

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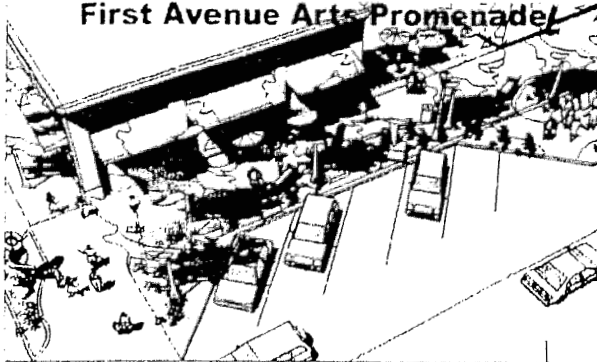


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GALLERY 260 | SITE LOCATION

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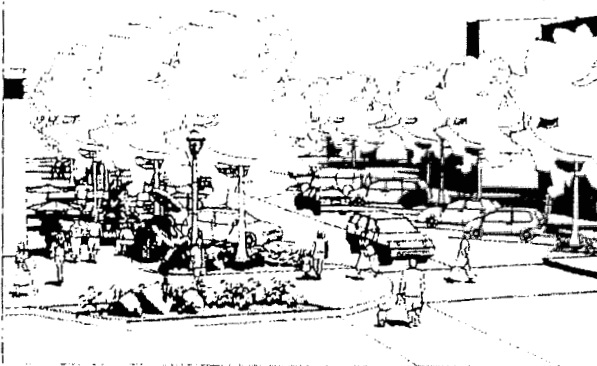
First Avenue Arts Promenade



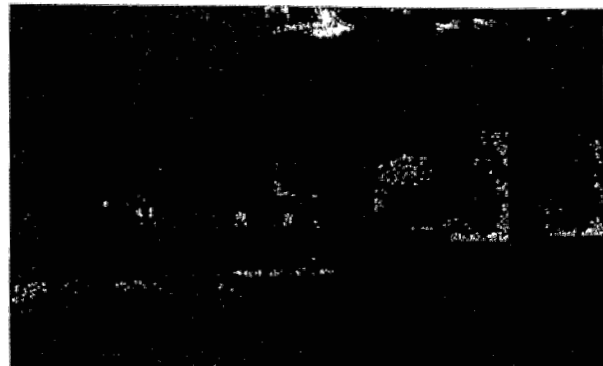
PROMENADE With Emphasis On Pedestrian Comfort, Public Art, And Botanical Plants



PROPOSED PROMENADE



LOOKING NW UP FIRST AVE FROM THIRD STREET



PROPOSED



Tree/Benching



Bench/Paver

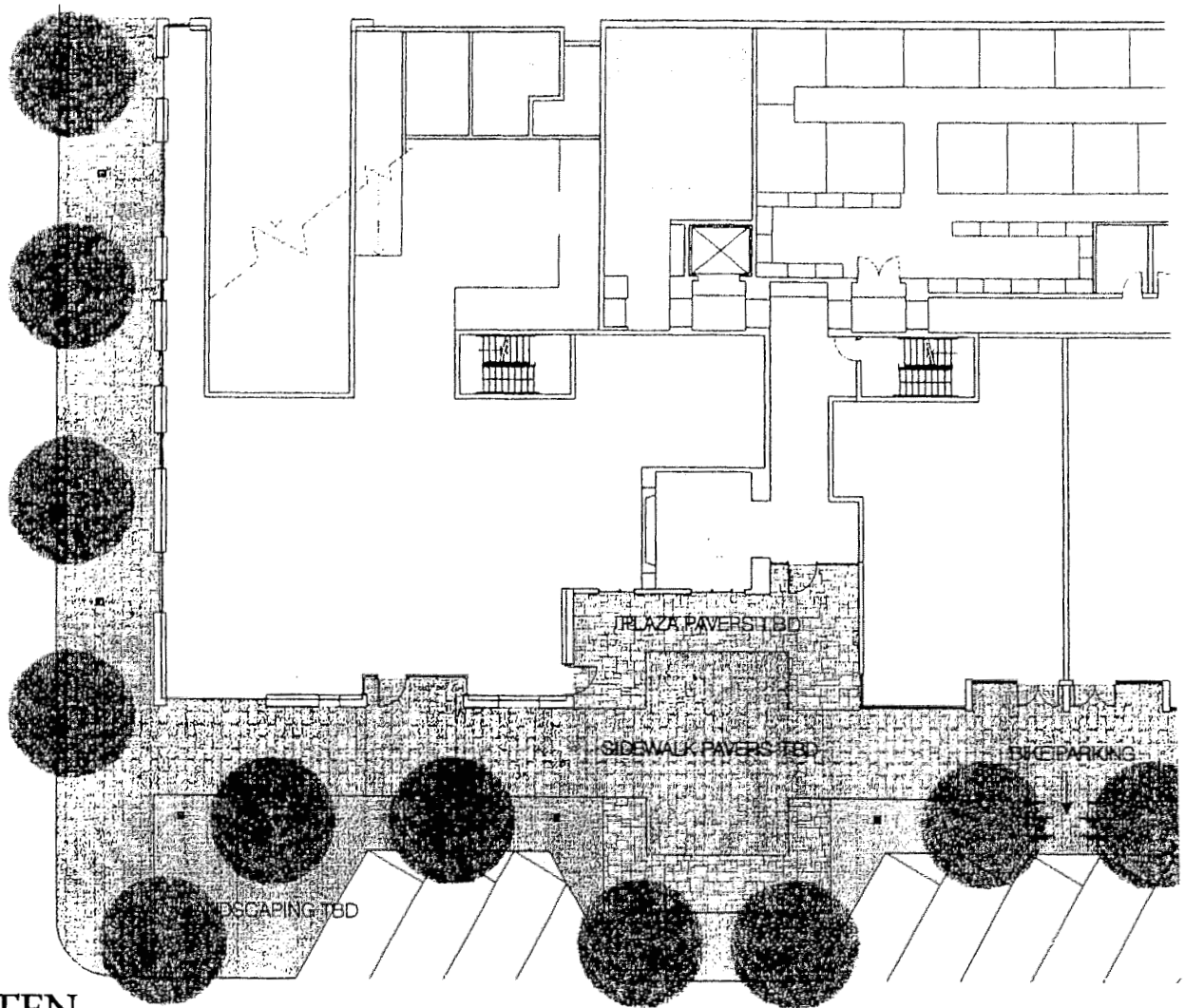


ARTS PROMENADE

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GALLERY 260 | MASTER PLAN

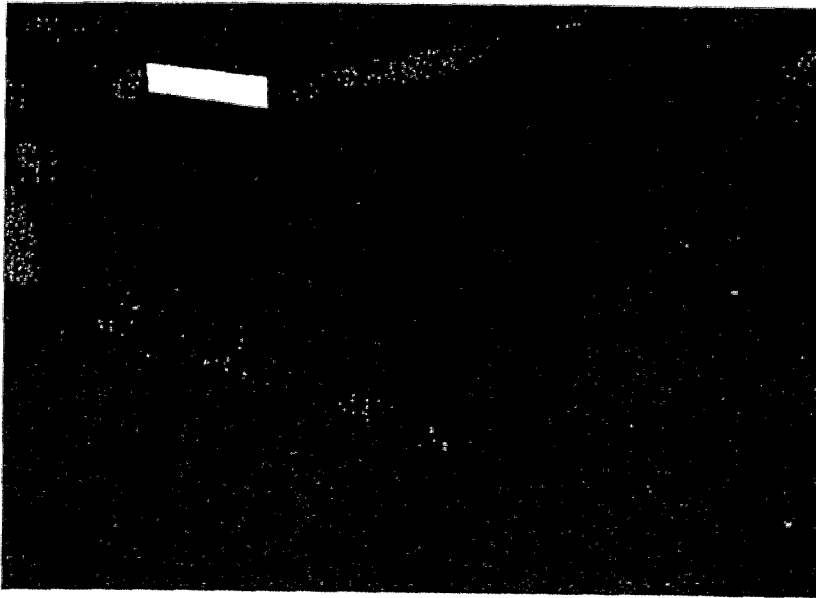
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GALLERY 260 | CONCEPTUAL SITE PLAN

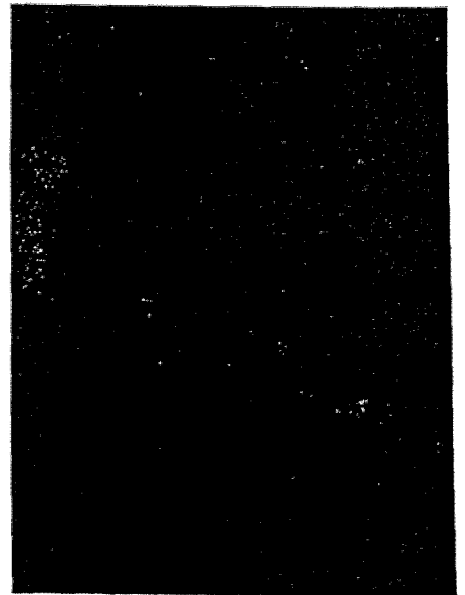
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MASSING ALLOWED



MASSING ALLOWED BY OLD CODE

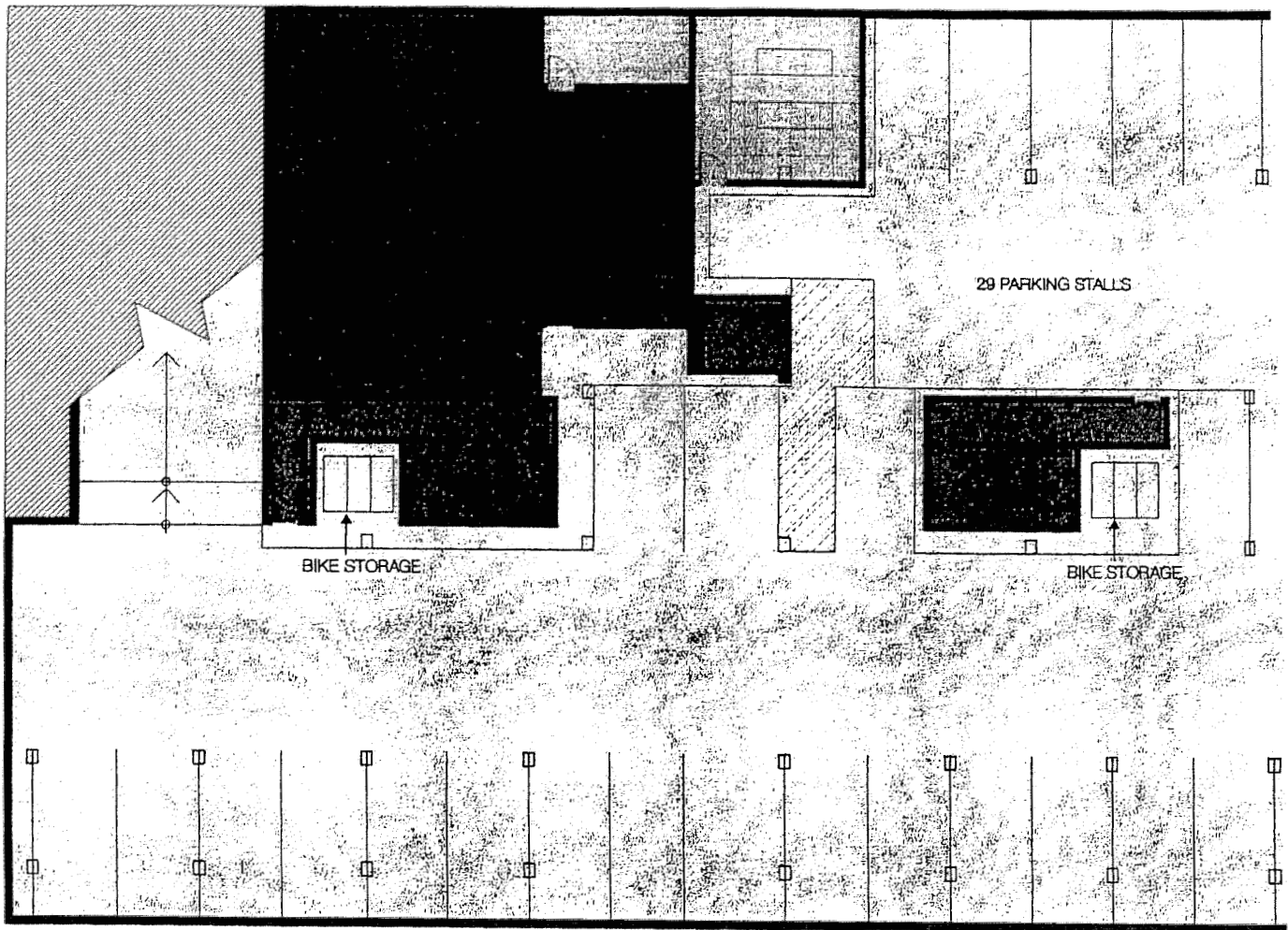


MASSING PROPOSED

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Company LLC

GALLERY 260 | PROJECT MASSING

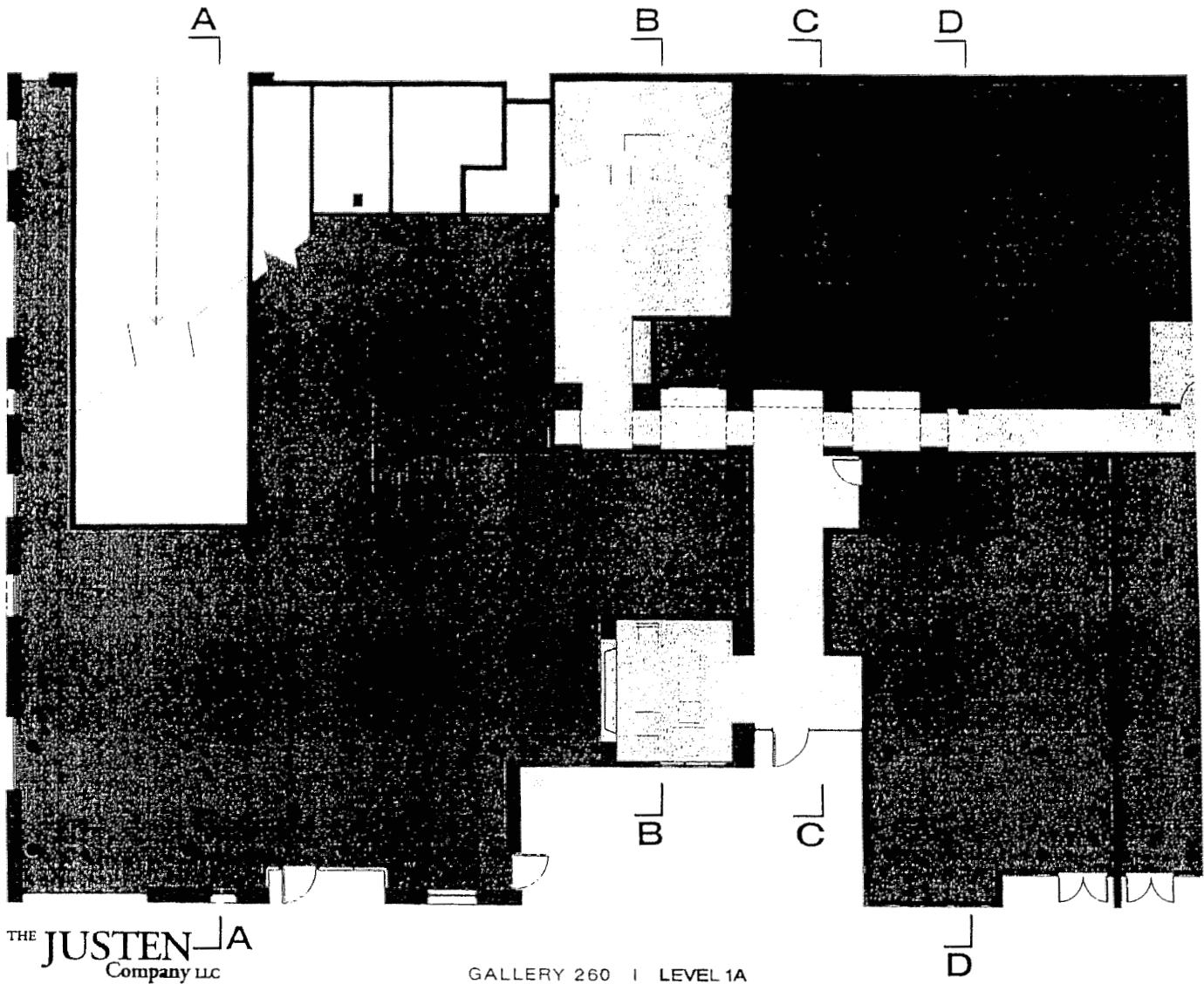
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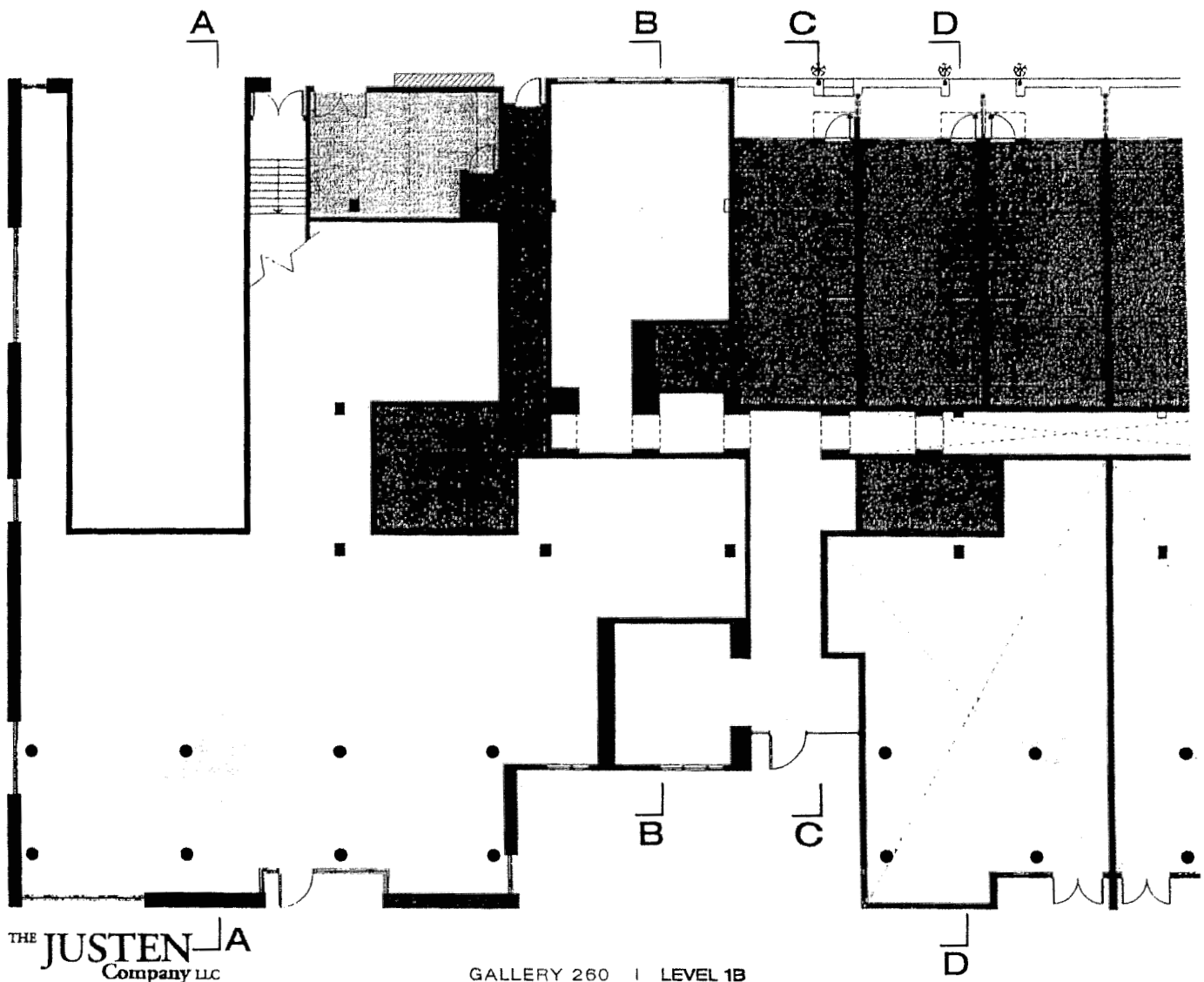
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GALLERY 260 | LEVEL P1

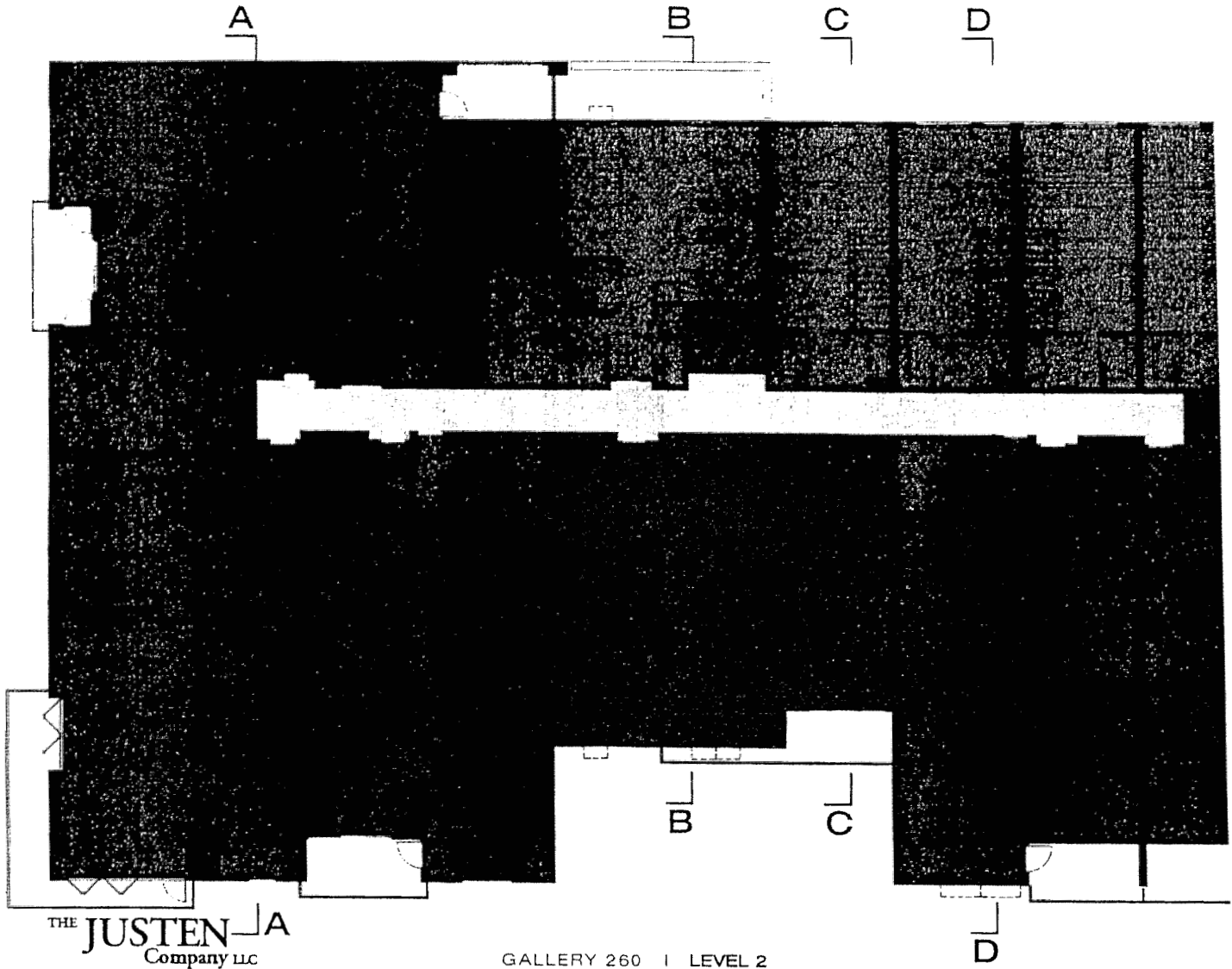
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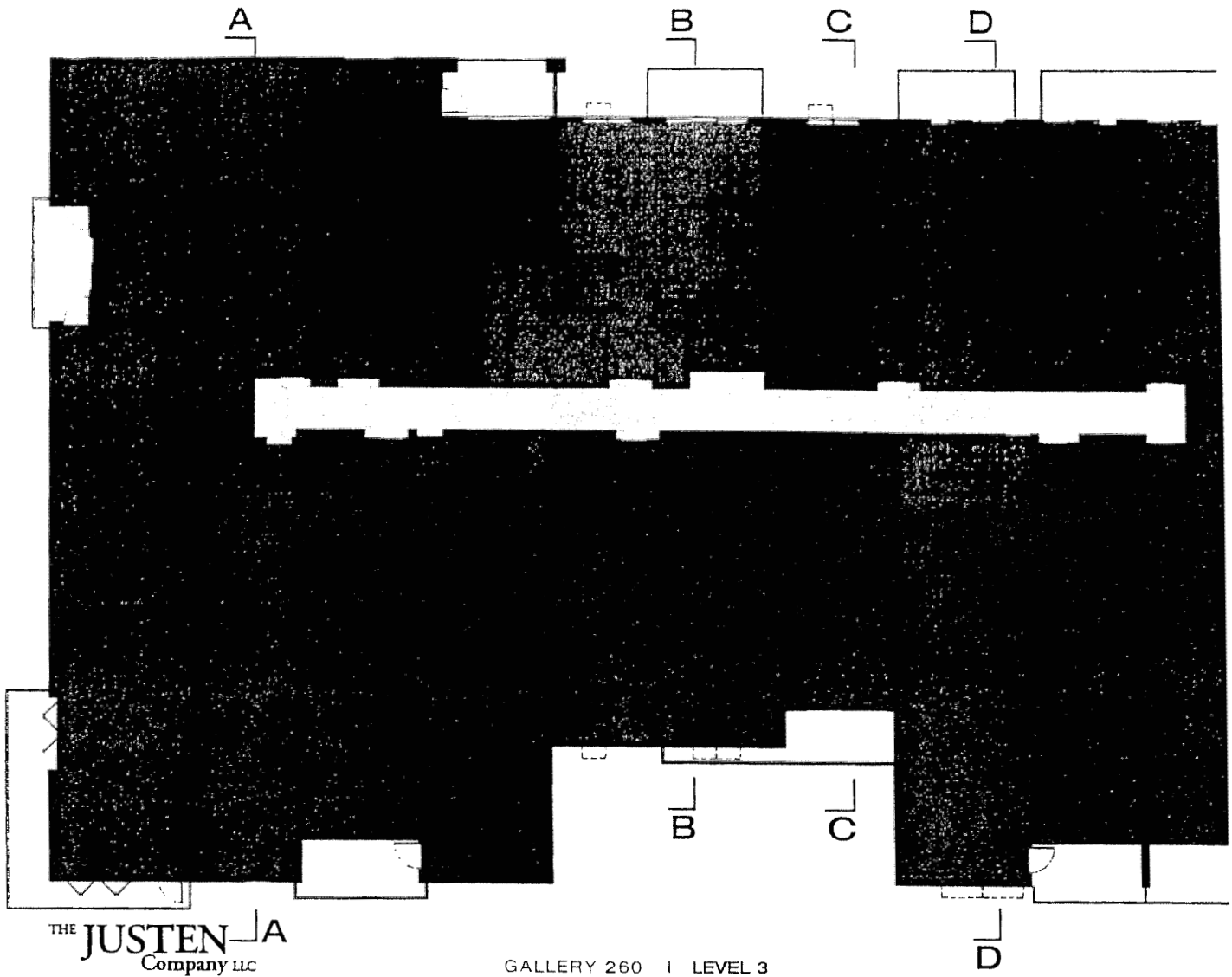
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GALLERY 260 | LEVEL 2

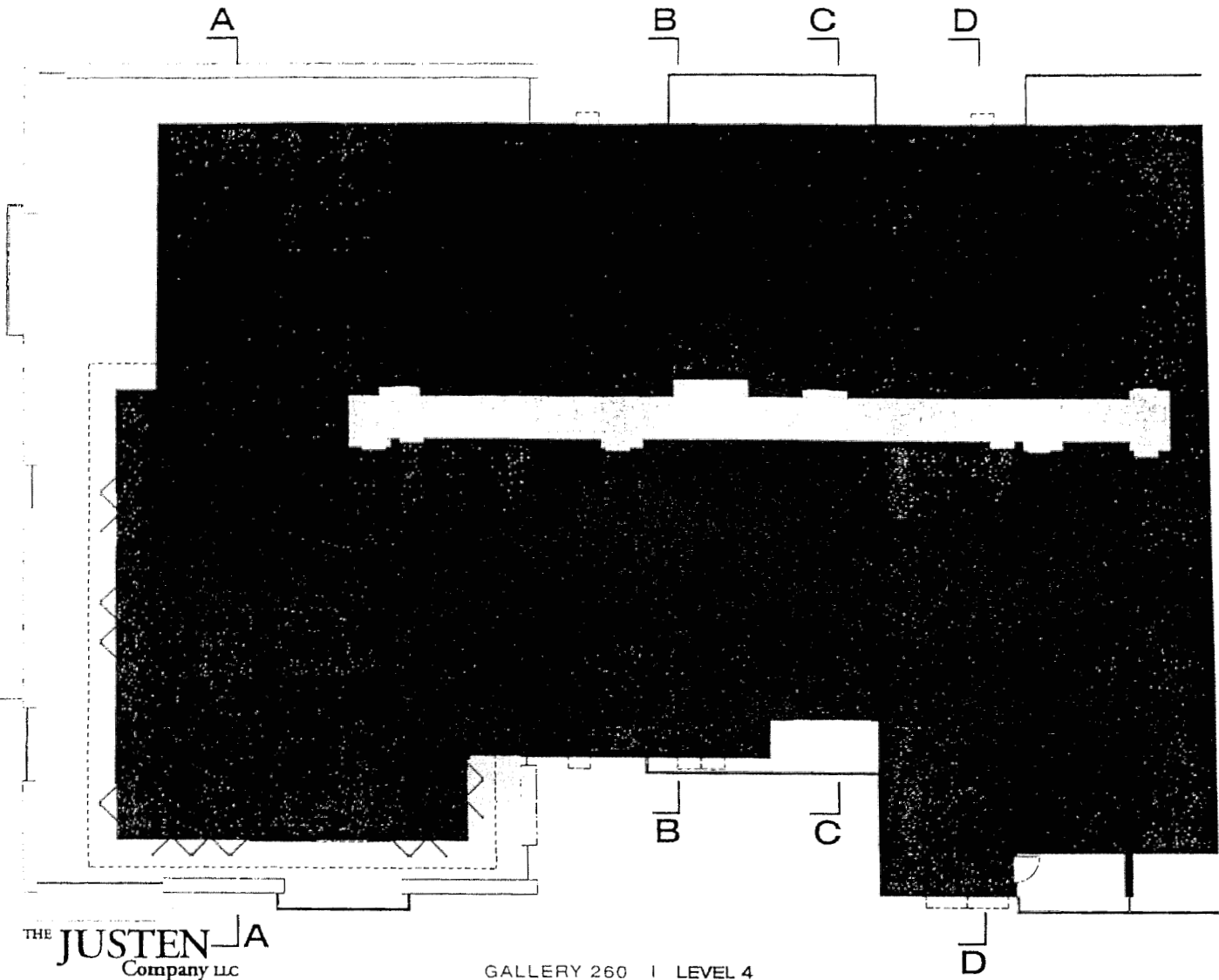
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GALLERY 260 | LEVEL 3

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GALLERY 260 | LEVEL 4

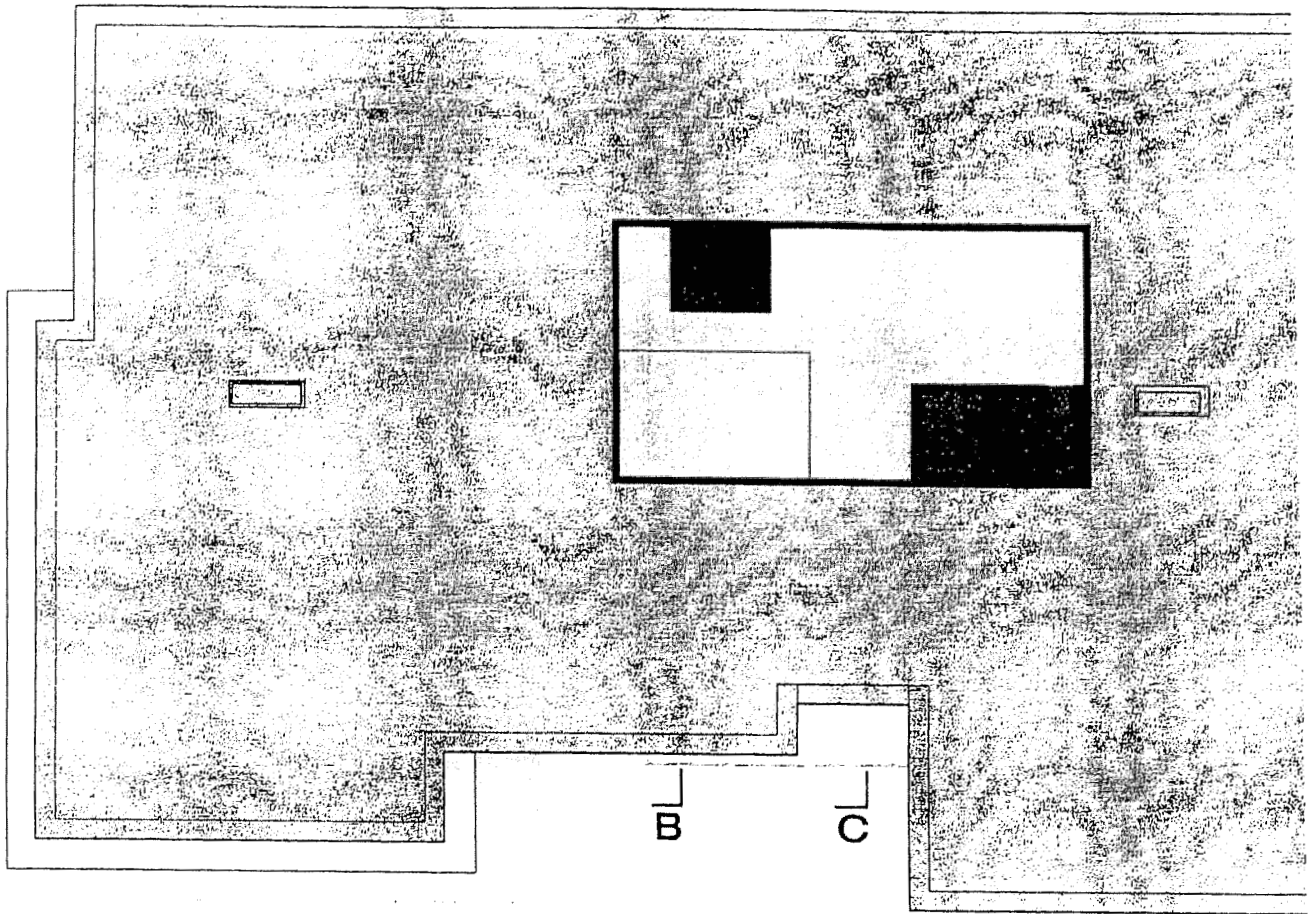
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A

B

C

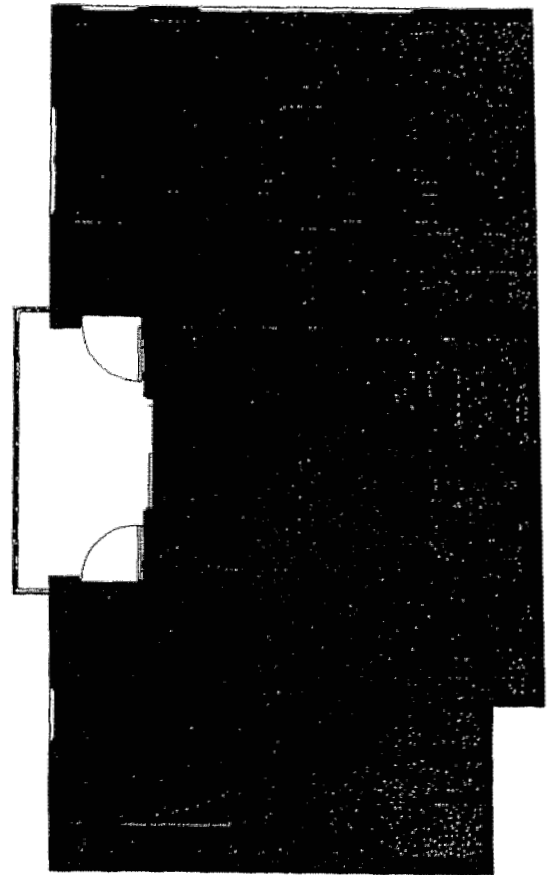
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GALLERY 260 | ROOF PLAN

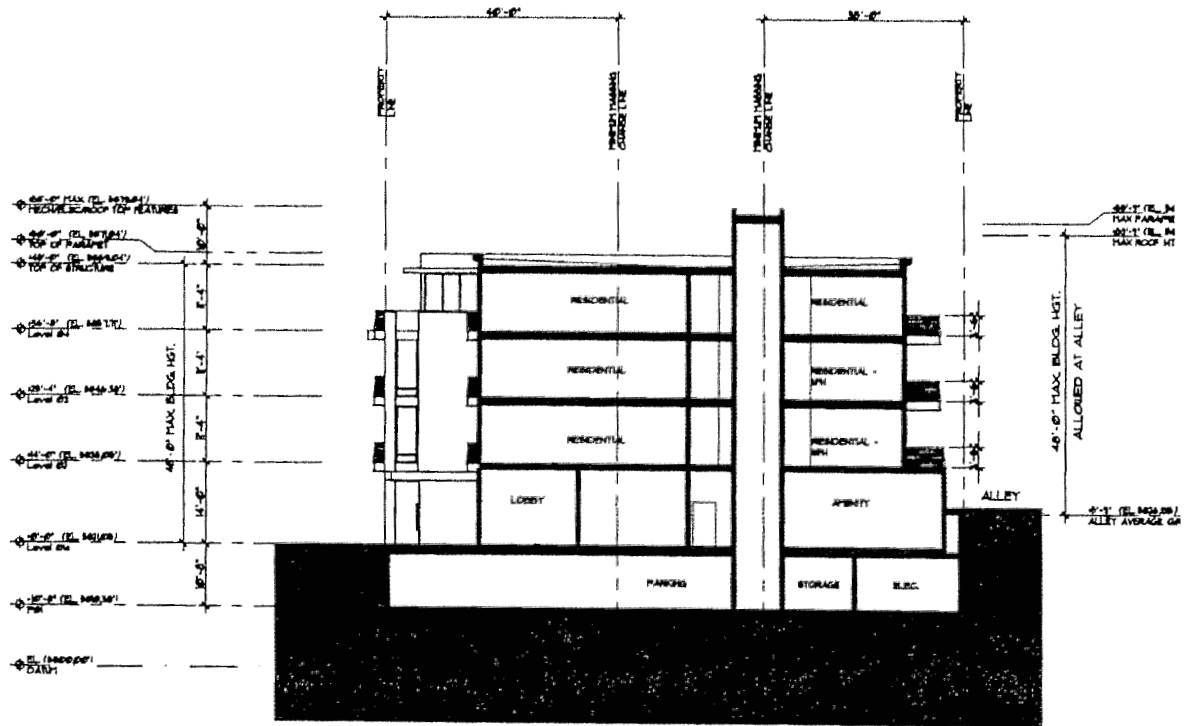
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GALLERY 260 | TYPICAL UNIT B+D

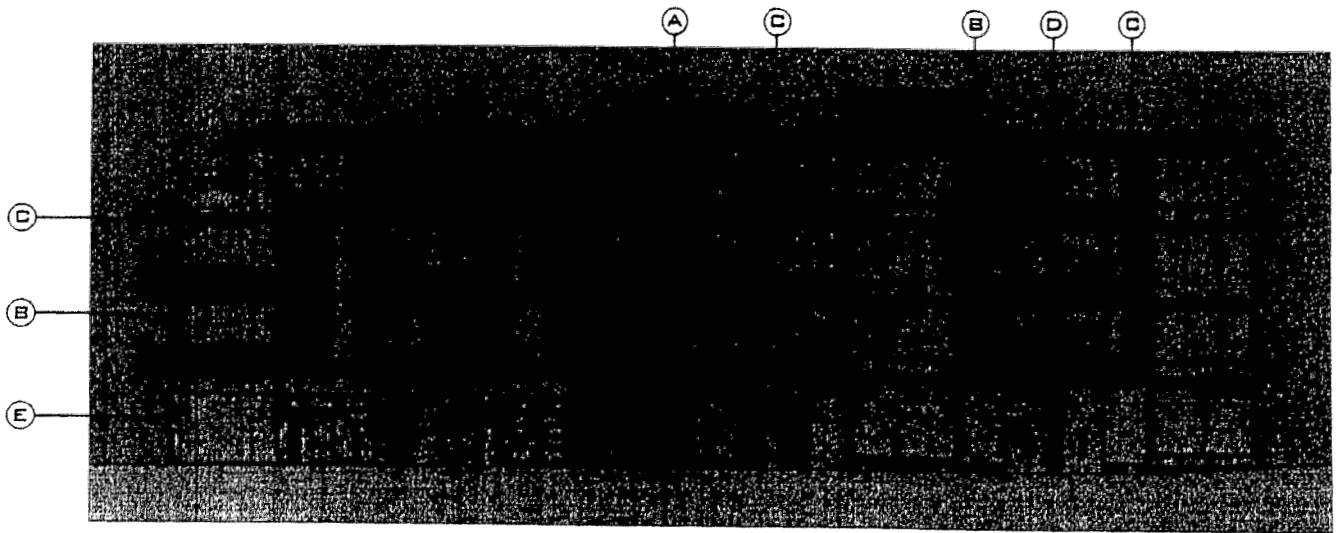
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GALLERY 260 | SECTION B-B

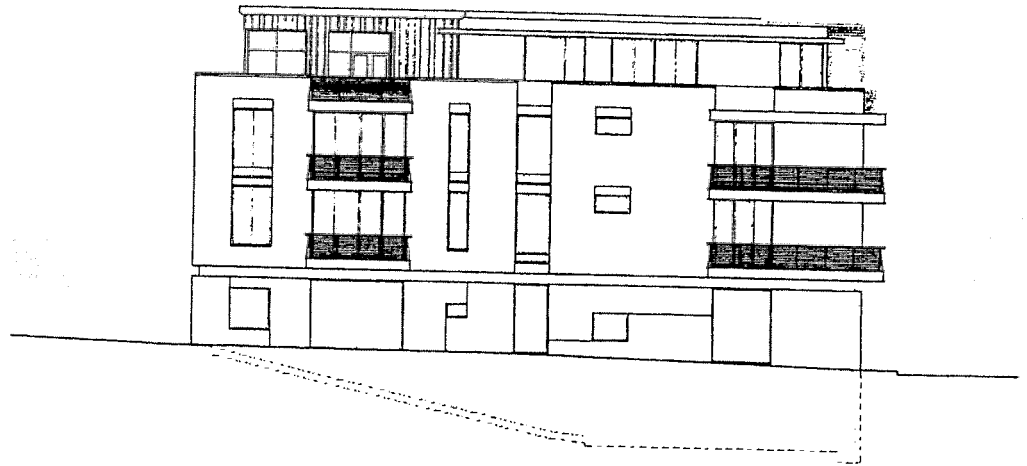
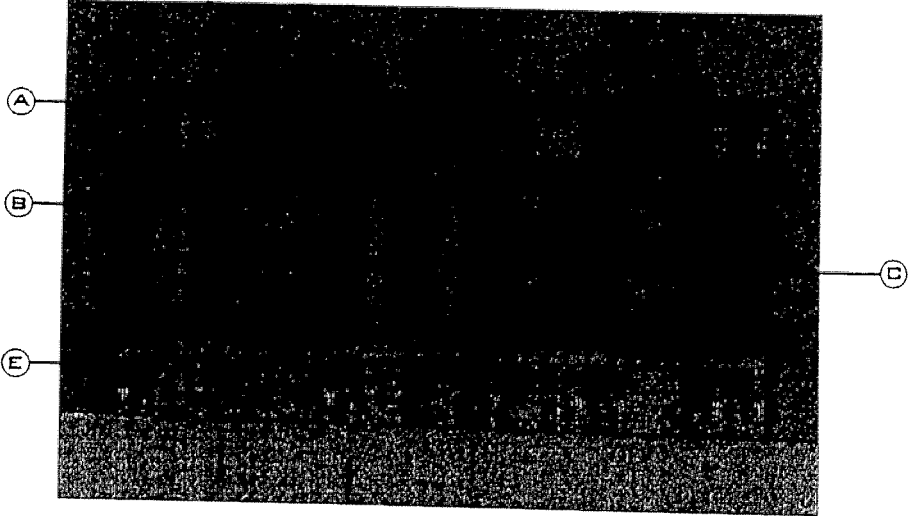
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GALLERY 260 | WEST 1ST AVENUE ELEVATIONS

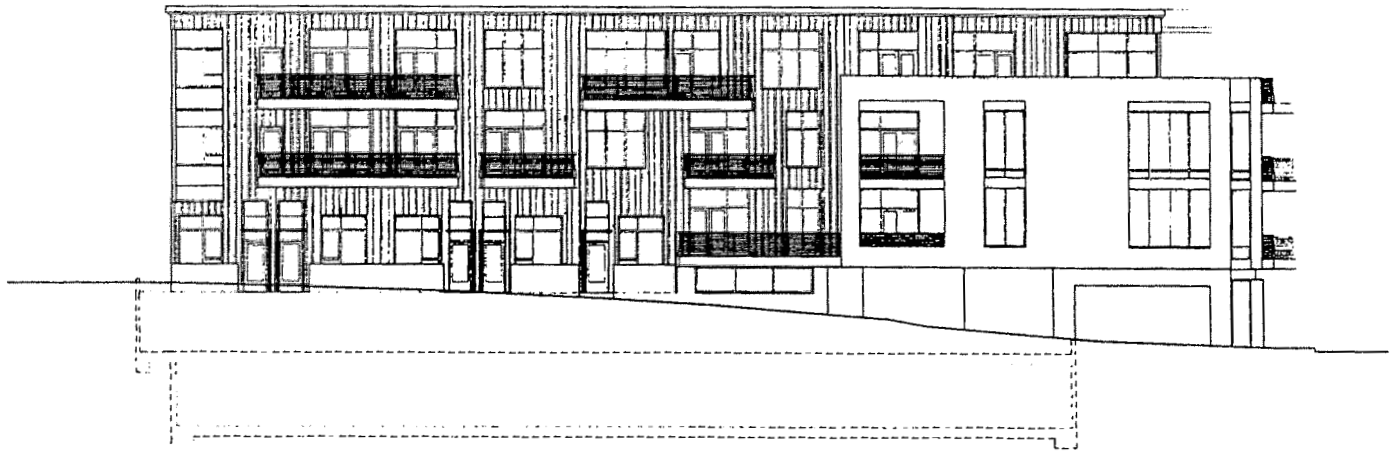
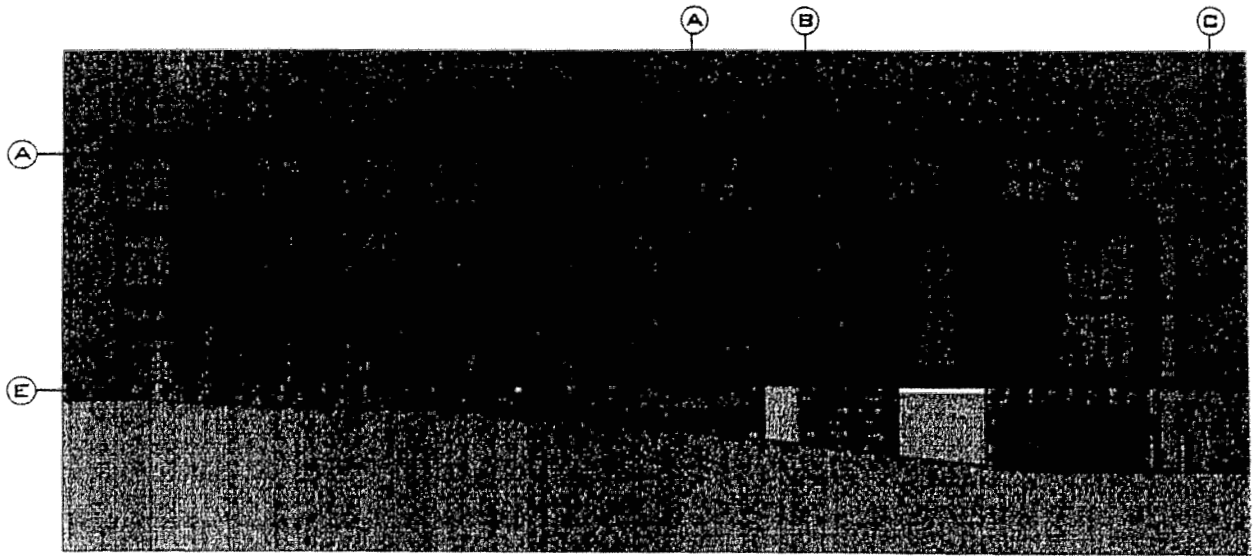
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GALLERY 260 | NORTH SUN VALLEY RD. ELEVATIONS

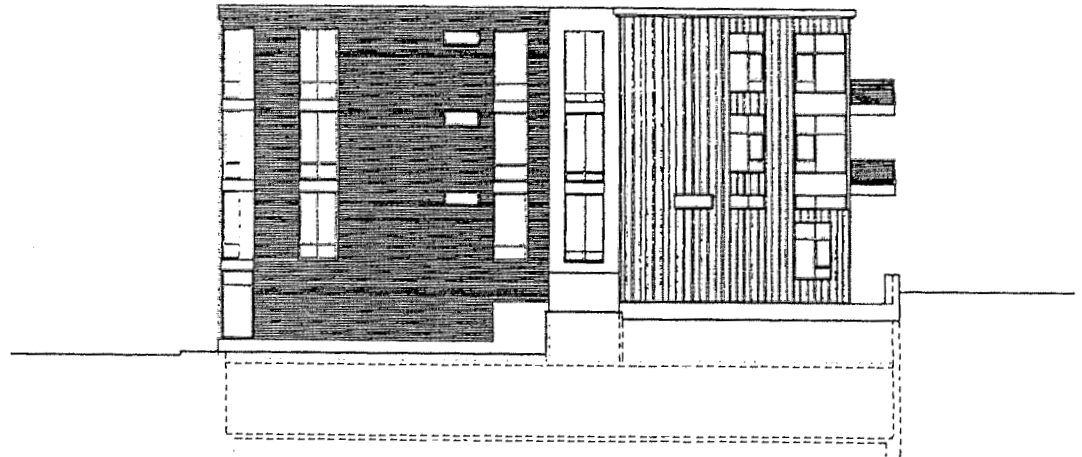
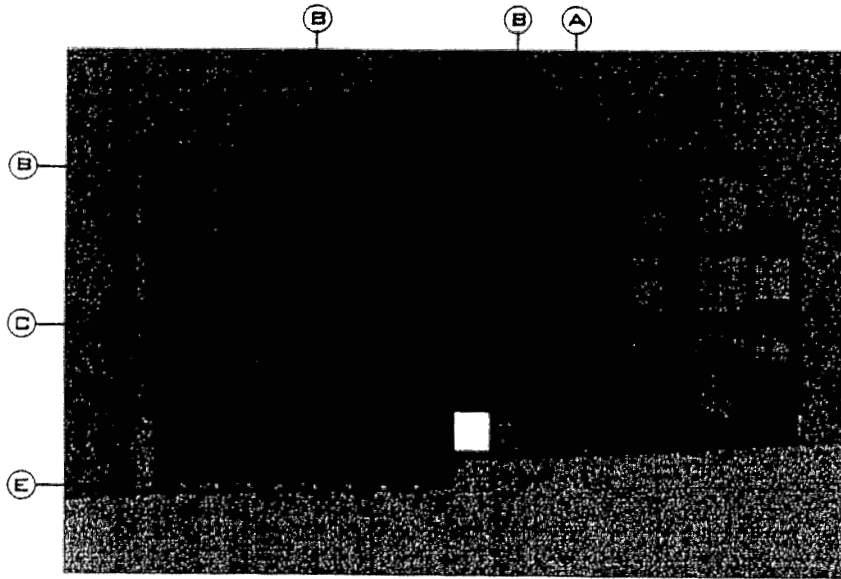
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GALLERY 260 | EAST ALLEY ELEVATIONS

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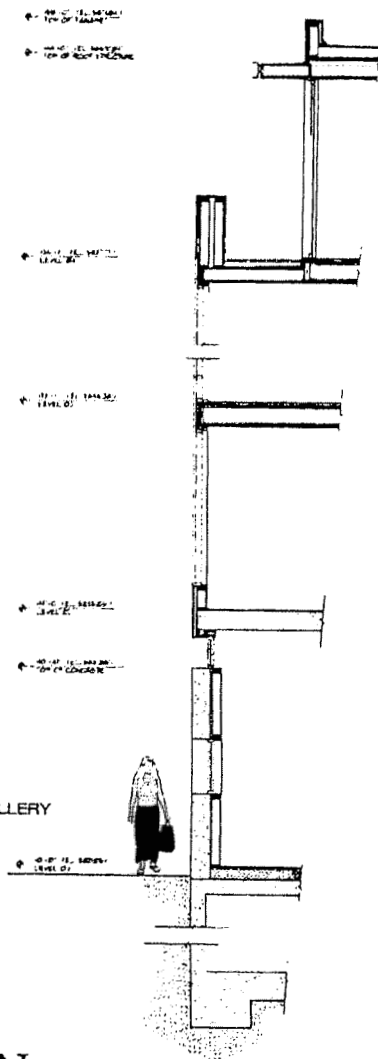


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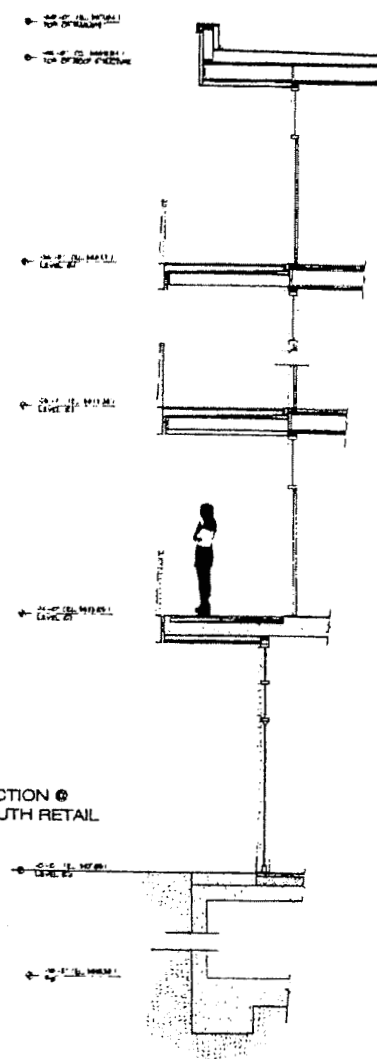
GALLERY 260 | SOUTH ELEVATIONS

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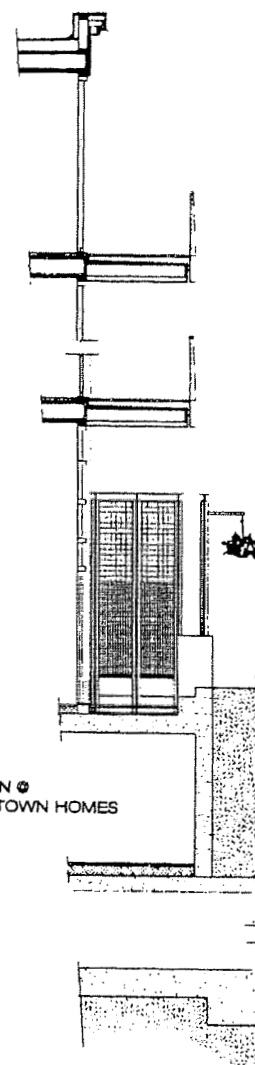
SECTION ②
ANNE REED GALLERY



SECTION ③
SOUTH RETAIL



SECTION ④
ALLEY TOWN HOMES



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GALLERY 260 | DETAIL SECTIONS

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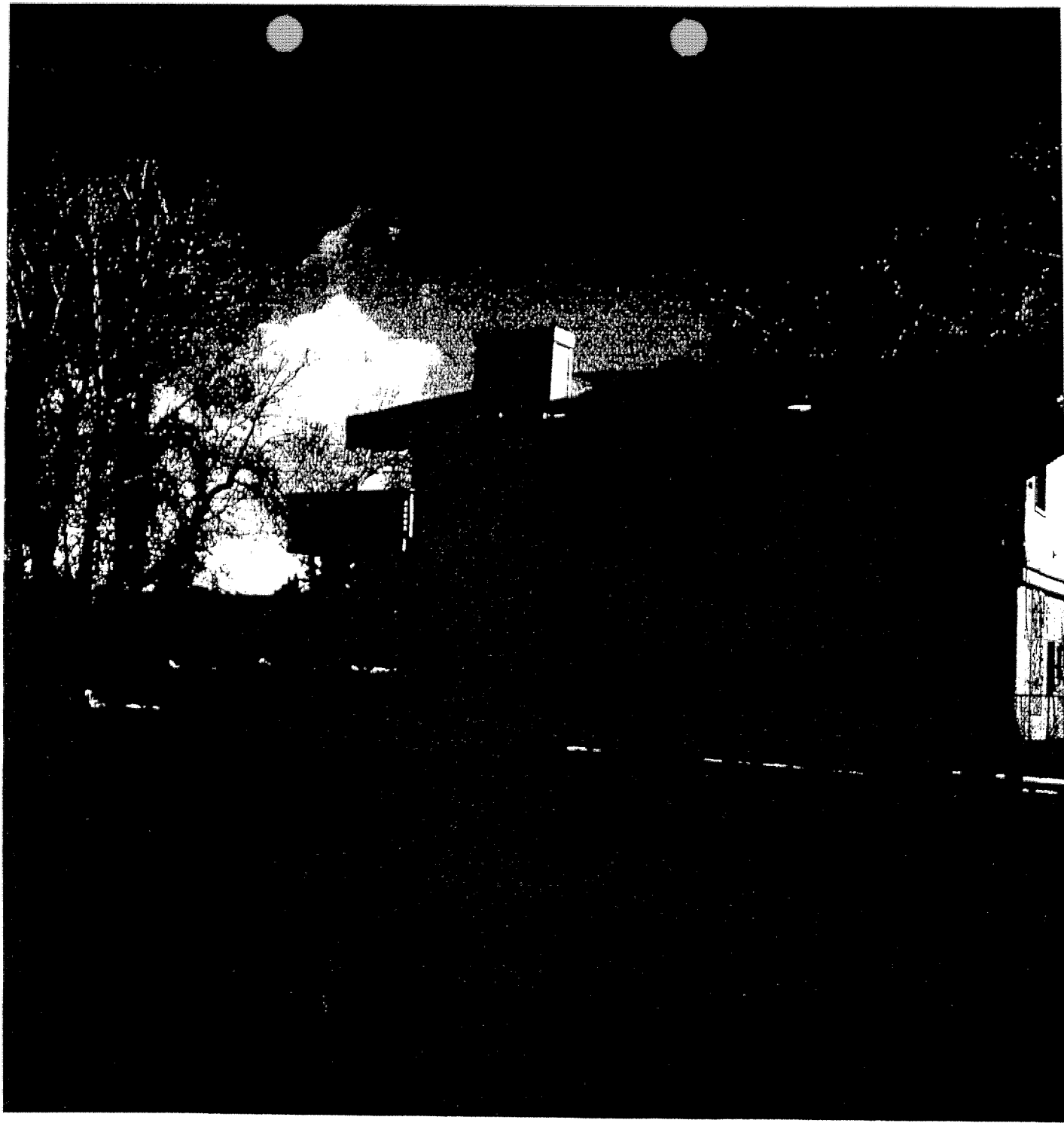
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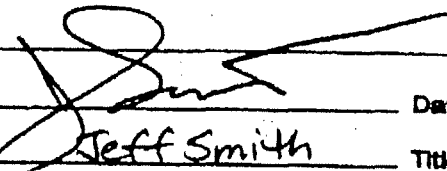
GALLERY 260 | NW CORNER

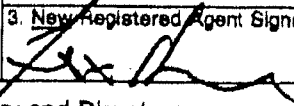
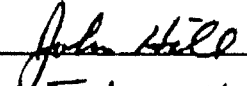
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260 First
Project Costs

ARCHITECT/ENGINEERING	\$928,913.53
CONSULTANTS	\$84,621.24
SURVEY/SOIL/ENVIRONMENTAL	\$21,432.11
PERMITS/MITIGATION FEES	\$61,579.06
TAXES AND INSURANCE	\$52,219.00
MARKETING	\$34,344.61
DEVELOPMENT	\$333,866.67
FINANCE COSTS	\$511,132.14
OPERATING COSTS	\$54,422.73
Total Costs to date	\$2,082,531.09



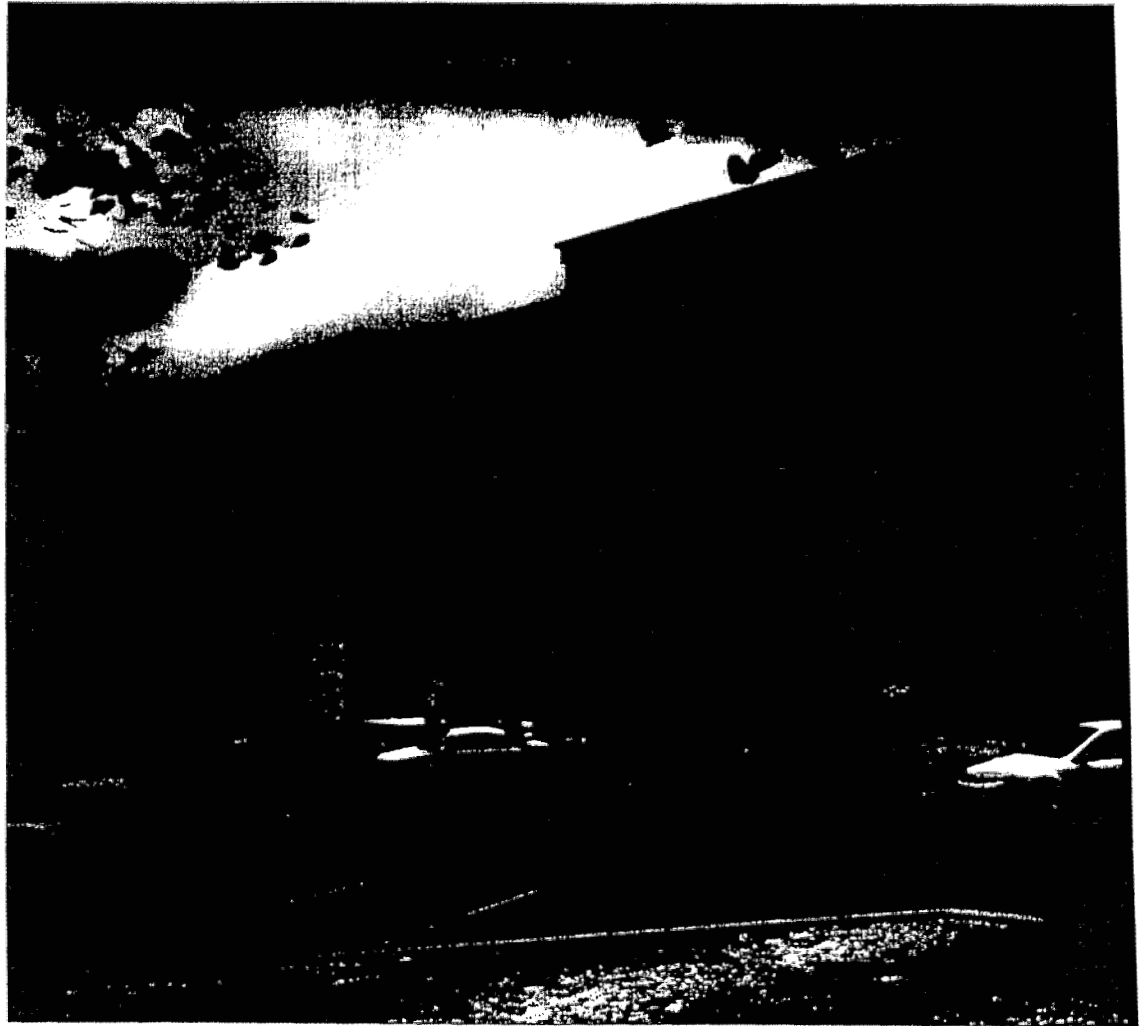
No. C 34810	Due no later than September 30, 2007 Annual Report Form		Registered Agent and Office NO PO BOX FRITZ HAEMMERLE 400 S MAIN STE 102 HAILEY, ID 83333
Return to: SECRETARY OF STATE 450 NORTH FOURTH STREET PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	1. Mailing Address - Correct in this box, if applicable ROTARUN SKI CLUB, INC. (THE) BOX 2083 HAILEY, ID 83333		3. New Registered Agent Signature
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.			
Office held	Name	Street or P.O. Address	City
President	Jeff Smith	PO Box 2083	Hailey
Vice-Pres.	Fritz Haemmerle	PO Box 2083	Hailey
Treasurer	Jack Hill	PO Box 2083	Hailey
Secretary	Sarah Busdon	PO Box 2083	Hailey
		State	Zip
		ID	83333
		ID	83333
		ID	83333
		ID	83333
5. Organized Under the Laws of: IDAHO C 34810		6. Signature  Date <u>9/4/07</u> Name (Typed or Printed) <u>Jeff Smith</u> Title <u>President</u>	
Issued 07/02/2007		Do Not Tape or Staple	
		200709000181	

No. C 34810 Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	Due no later than September 30, 2006 Annual Report Form 1. Mailing Address - Correct in this box, if applicable ROTARUN SKI CLUB, INC. (THE) P.O. BOX 2083 BOX 2083 HAILEY, ID 83333	2. Registered Agent and Office NO PO BOX RED-01-000001 Fritz Hammer 25 REDEGO DR 400 S. Main, Ste. 102 HAILEY, ID 83333 3. New Registered Agent Signature 																																																																		
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors. <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Office held</th> <th style="text-align: left;">Name</th> <th style="text-align: left;">Street or P.O. Address</th> <th style="text-align: left;">City</th> <th style="text-align: left;">State</th> <th style="text-align: left;">Zip</th> </tr> </thead> <tbody> <tr> <td>Pres.</td> <td>Jebb Smith</td> <td>17926 Hwy 20</td> <td>Bellevue</td> <td>ID</td> <td>83813</td> </tr> <tr> <td>Secy.</td> <td>Sarah Busdon</td> <td>P.O. Box 7462</td> <td>Hailey</td> <td>ID</td> <td>83333</td> </tr> <tr> <td>Treas.</td> <td>John Hill</td> <td>P.O. Box 2773</td> <td>Hailey</td> <td>ID</td> <td>83333</td> </tr> <tr> <td>Board</td> <td>Joan Davies</td> <td>214 2nd Ave</td> <td>Hailey</td> <td>ID</td> <td>83333</td> </tr> <tr> <td>"</td> <td>Ned Gibowski</td> <td>P.O. Box 2695</td> <td>Hailey</td> <td>ID</td> <td>83333</td> </tr> <tr> <td>"</td> <td>Fritz Hammer</td> <td>P.O. Box 1800</td> <td>Hailey</td> <td>ID</td> <td>"</td> </tr> <tr> <td>"</td> <td>Adela Savaria</td> <td>P.O. Box 551</td> <td>Hailey</td> <td>ID</td> <td>"</td> </tr> <tr> <td>"</td> <td>Larry Smith</td> <td>P.O. Box 2606</td> <td>Hailey</td> <td>"</td> <td>"</td> </tr> <tr> <td>"</td> <td>Troy Tlayer</td> <td>P.O. Box 1664</td> <td>Hailey</td> <td>"</td> <td>"</td> </tr> <tr> <td>"</td> <td>Scott Wesley</td> <td>P.O. Box 697</td> <td>Hailey</td> <td>"</td> <td>"</td> </tr> </tbody> </table>			Office held	Name	Street or P.O. Address	City	State	Zip	Pres.	Jebb Smith	17926 Hwy 20	Bellevue	ID	83813	Secy.	Sarah Busdon	P.O. Box 7462	Hailey	ID	83333	Treas.	John Hill	P.O. Box 2773	Hailey	ID	83333	Board	Joan Davies	214 2nd Ave	Hailey	ID	83333	"	Ned Gibowski	P.O. Box 2695	Hailey	ID	83333	"	Fritz Hammer	P.O. Box 1800	Hailey	ID	"	"	Adela Savaria	P.O. Box 551	Hailey	ID	"	"	Larry Smith	P.O. Box 2606	Hailey	"	"	"	Troy Tlayer	P.O. Box 1664	Hailey	"	"	"	Scott Wesley	P.O. Box 697	Hailey	"	"
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"	Troy Tlayer	P.O. Box 1664	Hailey	"	"																																																															
"	Scott Wesley	P.O. Box 697	Hailey	"	"																																																															
5. Organized Under the Laws of: IDAHO C 34810	6. Signature  Date <u>9-5-06</u> Name (Typed or Printed) <u>John Hill</u> Title <u>Treas</u>																																																																			

Issued 07/03/2006

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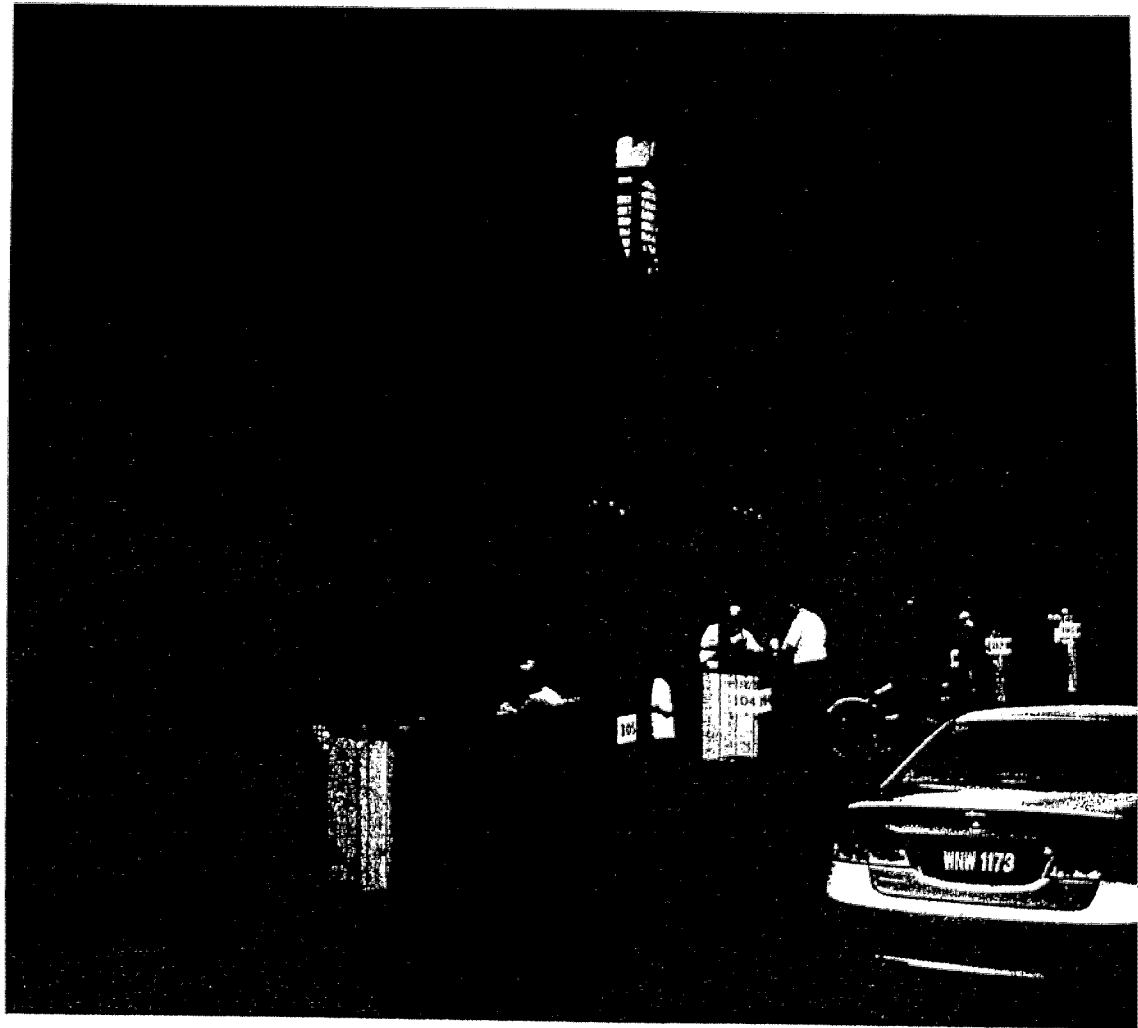
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GALLERY 260 | SW CORNER

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GALLERY 260 | SE CORNER

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Company LLC

GALLERY 260 | NE CORNER

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17.64.020.4G-1: BALCONY DESIGN REGULATION

REQUIREMENT	REQUEST	RATIONAL
THE DISTANCE BETWEEN ROOF-SUPPORTING COLUMNS, PIERS, OR POSTS ON BALCONIES SHALL NOT EXCEED THEIR HEIGHT	APPROVE THE BALCONY DESIGN CURRENTLY SHOWN. CURRENTLY, THE WIDTH BETWEEN THE ROOF-SUPPORTING COLUMNS OR POSTS SLIGHTLY EXCEEDS THE BALCONY HEIGHT.	THE DESIGN OF THE BALCONY IS INTEGRAL TO THE DESIGN OF THE FACADE AS A WHOLE, AND TO CHANGE THE BALCONY WOULD CREATE A DETRIMENTAL CHANGE IN OVERALL PROPORTIONING. THE DIFFERENCE IN WIDTH AND HEIGHT OF THE BALCONY IS NEGLIGIBLE.

17.64.010 K.1.c v C: FACADE TRANSPARENCY

REQUIREMENT	REQUEST	RATIONAL
GROUND FLOOR FACADE WINDOW PENETRATION: 60 - 90 PERCENT OF EACH GROUND FLOOR FACADE SHALL BE OCCUPIED BY TRANSPARENT WINDOWS AND DOORS	APPROVE THE SUN VALLEY ROAD GROUND FLOOR FACADE AS CURRENTLY SHOWN. CURRENTLY, 45 PERCENT OF THE FACADE IS OCCUPIED BY TRANSPARENT WINDOWS AND DOORS.	THE SUN VALLEY ROAD FACADE WAS CAREFULLY DESIGNED TO ENCOMPASS THE FUTURE TENANT'S NEEDS, PEDESTRIAN VISUAL INTEREST, AND A GROUNDED BASE FOR THE BUILDING AS A WHOLE. THIS DESIGN ALSO HELPS CREATE THE HORIZONTAL DESIGN ELEMENT NEEDED TO DIFFERENTIATE BETWEEN THE GROUND FLOOR AND THE UPPER FLOORS.

17.64.010 K.1a.III.D.2: MAXIMUM NUMBER OF FLOORS

REQUIREMENT	REQUEST	RATIONAL
THE FOURTH FLOOR SHALL STEP BACK FROM THE PROPERTY LINE ADJACENT TO ANY STREET, AVENUE OR ALLEY A MINIMUM OF 5 FEET, WITH AN AVERAGE OF 10 FEET, ON EACH FACADE.	APPROVE THE SOUTH END OF THE FOURTH FLOOR AT 1ST AVE. AS SHOWN.	THE 1ST AVENUE FACADE WAS DESIGNED TO LOOK LIKE THREE BUILDINGS UNDER A SINGLE DESIGN THEME. WHILE THE FOURTH FLOOR FACADE PLANE AT THE NORTH SECTION STEPS BACK FROM THE SECOND AND THIRD FLOOR FACADES, THE FOURTH FLOOR FACADE PLANE AT THE SOUTH SECTION WAS BROUGHT FORWARD TO MATCH THE SECOND AND THIRD FLOOR FACADES. THIS PLANE CHANGE HELPS CREATE DISTINCTION BETWEEN THE BUILDING SECTIONS, BUT THE MATERIAL LANGUAGE KEEPS THE FACADE, AS A WHOLE, CONNECTED.

17.64.010 K.1a.II.B: SETBACK LINE

REQUIREMENT	REQUEST	RATIONAL
THE BUILDING FACADE SHALL BE SET BACK AN AVERAGE OF 5 FEET FROM THE FRONT PROPERTY LINE, AND FROM THE SIDE PROPERTY LINE OF A CORNER LOT.	APPROVE THE SUN VALLEY ROAD BUILDING FACADE LOCATION AS CURRENTLY SHOWN. CURRENTLY, THE BUILDING IS LOCATED ON THE SIDE PROPERTY LINE.	THE EXISTING 7 FOOT WIDE SIDEWALK WILL BE REPLACED WITH A 10 1/2 FOOT WIDE SIDEWALK AS DICTATED IN THE CURRENT CITY OF KETCHUM MASTER PLAN. THE DISTANCE FROM THE BUILDING TO THE TREE GRATES WILL BE 10 FEET CLEAR. PUSHING THE BUILDING TO THE PROPERTY LINE WILL CREATE A PLEASING URBAN DESIGN SOLUTION, ENCOURAGING PEDESTRIAN ACTIVITY AND INTERACTION. ENFORCING THE 5 FOOT SETBACK AT SUN VALLEY ROAD WOULD CREATE AN EXCESSIVE, 10 1/2 FOOT WIDE SIDEWALK. ADDITIONAL FACTORS THAT INFLUENCED THE ELIMINATION OF THE 5 SETBACK AT SUN VALLEY ROAD INCLUDE: <ul style="list-style-type: none">TO ACCOMMODATE OUR NEIGHBORS TO THE EAST, PORTIONS OF THE BUILDING WERE PUSHED BACK FROM THE ALLEY TO INCREASE THE DISTANCE BETWEEN THE BUILDINGS.TO ENSURE THAT THE WORK FORCE HOUSING TOWNHOUSE UNITS CONTAINED OUTDOOR TERRACE SPACE, THE BUILDING PORTION AT THE ALLEY WAS PUSHED BACK EVEN FURTHER FROM THE REAR PROPERTY LINE.TO COMPLY WITH BOTH THE IDC REQUIREMENTS AND CITY OF KETCHUM FACADE TRANSPARENCY REQUIREMENTS, AND TO PROVIDE THE FUTURE TENANT'S GLAZING, THE FACADE AT THE SOUTH WAS PUSHED 5 FEET BACK FROM THE PROPERTY LINE.TO MAKE UP THE FLOOR AREA RATIO, THE BUILDING FACADE AT SUN VALLEY ROAD WAS PUSHED UP TO THE PROPERTY LINE.

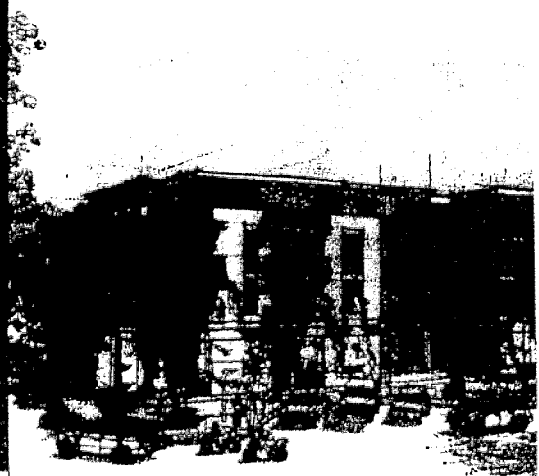
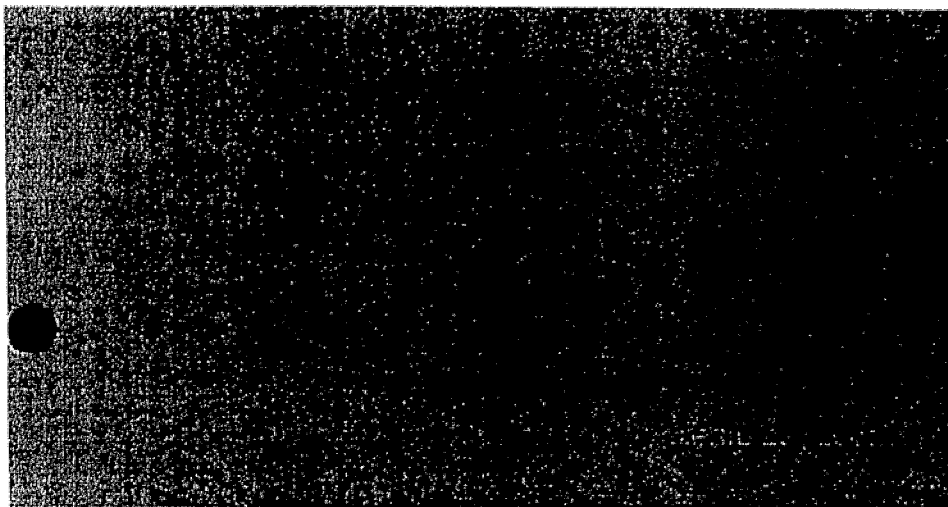


EXHIBIT B

APPLICATION AND CERTIFICATE FOR PAYMENT

AIA DOCUMENT G702

OWNER: The Justen Co.
512 Second Ave, Suite 200
Seattle, WA 98104

PROJECT: Gallery 280 First Condominiums
260 First Avenue
Ketchum, ID 83340

APPLICATION NO: 1

PERIOD FROM: 1-Jan-08
PERIOD TO: 10-Apr-08

ATTN: Scott Roberts

FROM (CONTRACTOR): Oakland Const. Co. Inc.
1978 South West Temple
Salt Lake City, Utah 84115

VIA ARCHITECT: Weber Thompson
225 Terry Ave. N Suite 200
Seattle, WA 98109

OKLAND JOB NO. 917

Project No.:

CONTRACT DATE:

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for Payment, as shown below, in continuation of Continuation Sheet, Document G703, is attached.

CHANGE ORDER SUMMARY		ADDITIONS	DEDUCTIONS
Change Orders approved in previous months by Owner			
TOTAL			
Approved this Month			
Number	Date Approved		
TOTALS		\$0.00	\$0.00
Net Change by Change Orders			\$0.00

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

Contractor: OKLAND CONSTRUCTION COMPANY, INC.
1978 South West Temple
Salt Lake City, Utah 84115

By:

4/14/2008

1 CONTRACT SUM TO DATE.....
2 Net change by Change Orders.....
3 CONTRACT SUM TO DATE.....

4 TOTAL COMPLETED & STORED TO DATE.....
a. Previous Application \$
b. This Application..... \$ 172.38

5 TOTAL RETAINAGE.....
a. Previous Application \$
b. This Application..... \$ 7.94

6 TOTAL EARNED LESS RETAINAGE.....
(Line 4 less Line 5)

7 LESS PREVIOUS CERTIFICATES FOR PAYMENT.....
(Line 6 from Previous Certificate)

8 CURRENT PAYMENT DUE.....

9 BALANCE TO FINISH, PLUS RETAINAGE.....
(Line 3 Less Line 8)

State of: Utah

Subscribed and sworn to before me this 14th day of April,
Notary Public:

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED

(Attach explanation if amount certified differs from the amount applied for.)
ARCHITECT:

BY:

This Certificate is not negotiable. The AMOUNT CERTIFIED is for the benefit of the Contractor named herein. Issuance, payment and acceptance of this Certificate shall be without prejudice to any rights of the Owner or Contractor under the Contract Documents.



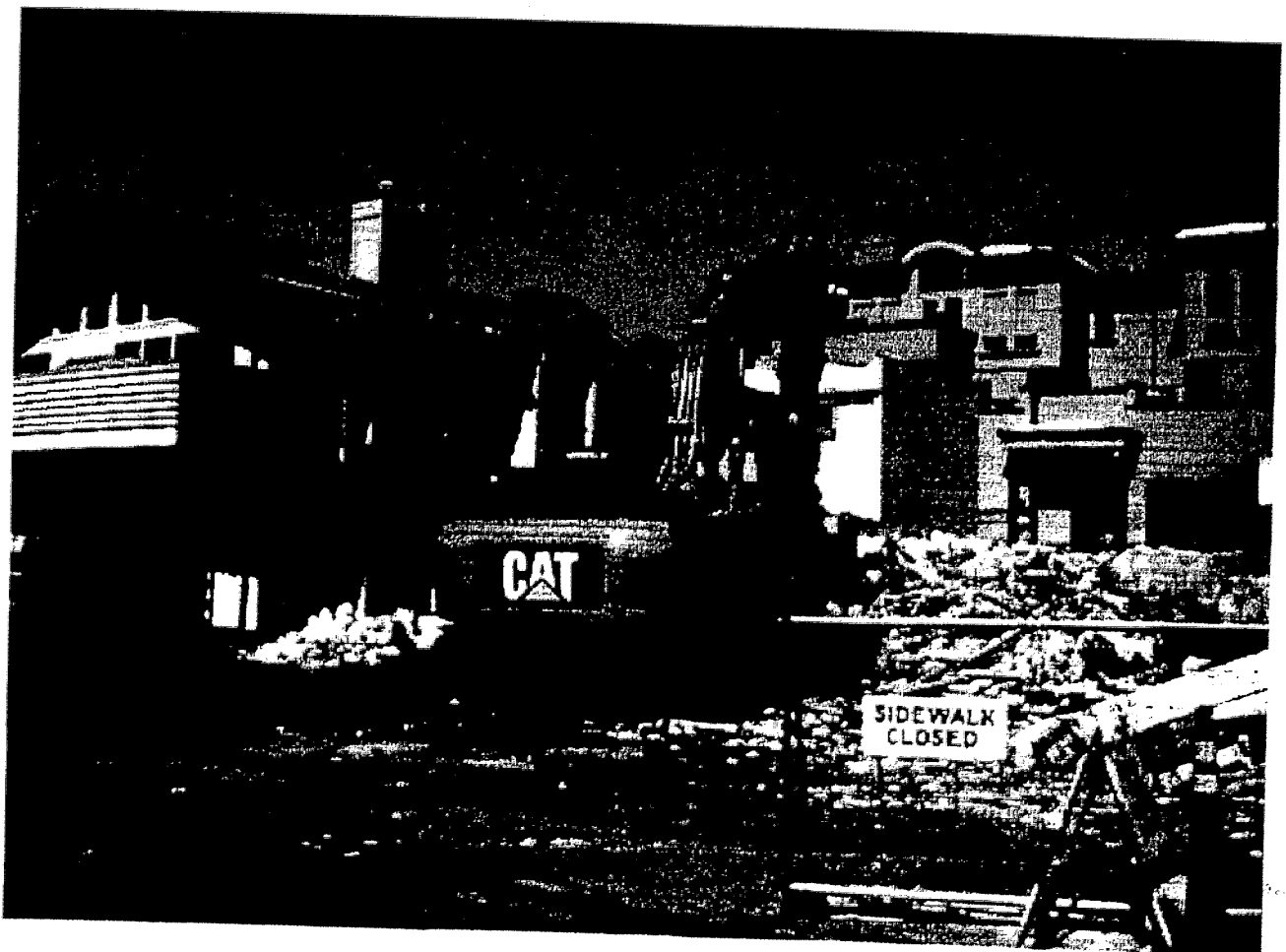


EXHIBIT LIST

EXHIBITS SUBMITTED BY THE CLERK:

1. Affidavit of Kathleen E. Rivers filed December 15, 2008, including Exhibits 1-4:
 - *Exhibit 1-complete legislative history for Idaho Code Section 67-6515A;
 - *Exhibit 2-complete legislative history for Idaho Code Section 67-4619 of the Historic Preservation Act; and
 - *Exhibit 3-Deposition of Sandy Cady, including Exhibits 1-3 to the Deposition:
 - (1) Exhibit 1 of Cady Deposition-Agency Record in Blaine County Case No. CV07-250 on the adoption of Ordinance 1005;
 - (2) Exhibit 2 of Cady Deposition-Agency Record in Blaine County Case No. CV08-233 on the adoption of Ordinance 1034;
 - (3) Exhibit 3 of Cady Deposition-Affidavit of Beth Robrahn, including Exhibits A-L attached to it, filed in Blaine County Case No. CV07-250.
 - *Exhibit 4-Deposition of Beth Robrahn in Blaine County Case No. CV08-233
2. Affidavit of Fritz X. Haemmerle in Support of Motion for Summary Judgment filed December 12, 2009, including Exhibit 1-Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions.

KGF DEVELOPMENT, LLC,
Plaintiff-Appellant,
vs.
CITY OF KETCHUM, a municipal
corporation of the State of Idaho,
Defendant-Respondent.
260 FIRST LLC,
Intervenor/Respondent.

CLERK'S CERTIFICATE

By Andrea Logan
Andrea Logan, Deputy Clerk

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